VOA and AOA on the jury claims and in favor of Coast on VOA's and AOA's bench counterclaim. 26a-27a. Coast's substantially identical claims against VW Credit for breach of contract, breach of the duty of good faith and fair dealing were tried before the Superior Court of New Jersey, Law Division, with Coast prevailing proving that VW Credit committed a breach of contract, breach of the duty of good faith and fair dealing and committed lender liability. 20a-25a. Coast was awarded compensatory and punitive damages. 20a-25a. Subsequently on January 8, 2003, the district court dismissed, as moot, the only remaining claims in the case were the claims by Coast against VW Credit that had been remanded by this Court. 20a-25a.

LEGAL ARGUMENT FOR ALLOWANCE OF PETITION

I. THE THIRD CIRCUIT IMPROPERLY DISREGARDED THE PRECEDENT OF *VW CREDIT V. COAST AUTOMOTIVE GROUP, LTD, ET. AL., V. VOA AND AOA, ET. AL.*, 346 N.J. SUPER. 326, 787 A. 2D 951 (APP. DIV. 2002), *CERTIF. DENIED* 172 N.J. 178 (2002) IN WHICH THE SUPERIOR COURT, APPELLATE DIVISION, HELD THAT COAST WAS ELIGIBLE FOR RELIEF UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT

The Third Circuit's mishandling of this matter compels certification by this Court. The Third Circuit's decision stands in total contradiction to settled New Jersey state law governing franchises and Coast respectfully submits that it is

this Court's duty to correct the Third Circuit's misapplication and misapprehension of New Jersey franchise law. Where a Circuit Court disregards state law precedent in matters governing state law, this Court must intervene and correct the injustice. This is particularly true in this case, where the Third Circuit did not even discuss or distinguish the most important arguments raised by Coast on appeal.

In fact, during the same time period for which the Third Circuit held that Coast was ineligible to obtain judicial relief under The New Jersey Franchise Practices Act, Coast in fact obtained judgment under the New Jersey Franchise Practices against VOA and AOA in the state court, as affirmed by the Appellate Division in a reported decision. *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326, 787 A. 2d 951 (App. Div. 2002), *certif. denied* 172 N.J. 178 (2002).

Not only was the Third Circuit's decision wrong, its reasoning was flawed and ignored the factual and legal record. In affirming the District Court, the Third Circuit reached a result totally contrary to the New Jersey Franchise Practices Act, contrary to common law contract law and contrary to the established New Jersey franchise precedent which Coast, itself, made against VOA and AOA in the matter of *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326.

In imposing the jury instruction and verdict sheet question under N.J.S.A. §56:10-9 over Coast's vehement objection, the district court totally misstated the law governing Count

18 of Coast's complaint and improperly nullified Coast's successful claim under N.J.S.A. 56:10-7(e).

The Third Circuit's decision ratified VOA's and AOA's novel position of contract law on this appeal, that VOA and AOA **could choose** (55a) to continue to be in a relationship with Coast(waiving a purported right to terminate), but only selectively perform at their sole and exclusive discretion. VOA's and AOA's position is unheard of in any principal of contract law or statutory construction and, in fact, directly contrary to long standing, unassailable principles of contract law. *Stamato v. Borough of Lodi*, 4 N.J. 14, 21 (1950).

Rather than have a sophisticated discussion of contract law, contract law being the basis for the New Jersey Franchise Practices Act, the Third Circuit merely recited the black letter of N.J.S.A. §56:10-9 without any examination of the differences between franchise "termination" and "non-termination" cases or providing any discussion of Coast's arguments. Quite remarkably, **the Third Circuit failed to account for the fact that Coast had obtained relief under The New Jersey Franchise Practices Act against none other than VOA and AOA**—an extraordinary feat for a party that is allegedly ineligible for relief under The New Jersey Franchise Practices Act. The decision reached by the Third Circuit is not only wrong, but the rule established by it does not work.

Therefore, the question(s) raised by Coast is(are) not just whether the Third Circuit made the right decision. The Third Circuit clearly did not. More, however, is required by this Court to grant certiorari. In arriving at its blatantly wrong

decision, the Third Circuit willfully ignored many aspects of Coast's argument and failed to deal with crucial questions concerning New Jersey state law and precedent which were put before it:

> Coast's main contention is that it was entitled to a verdict on the NJFPA claim because § 56:10-9 is not a defense to Coast's 1996-1997 allocation claims. It argues that the jury instruction and verdict sheet question completely misstated the law and essentially deprived Coast of its proper NJFPA claim under § 56:10-7(e). According to Coast, the District Court erred in instructing the jury to excuse VOA/AOA from all liability based on Coast's alleged substantial noncompliance with the franchise agreement because VOA/AOA never elected to terminate the contract in the relevant time period and because no factual nexus existed between Coast's inequitable allocation claim and the alleged material breach.

11a. In its decision, the Third Circuit failed to have any discussion, whatsoever about the differences between a "termination" case and a "non-termination case." And, in doing so, the Third Circuit created a "retroactive termination" case.

Furthermore, the Third Circuit misrepresented this as a "case of first impression." It was not:

> We must, as a federal court asked to decide an open question of state law, look to the fundamental principles of statutory construction that would in-

form the New Jersey court's consideration of the issue.

11a. Hardly a case of first impression, during this time period, Coast, itself, obtained judgment against VOA and and AOA pursuant to the New Jersey Franchise Practices Act and N.J.S.A. 56:10-6. The Third Circuit failed to address at all the *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326, 787 A. 2d 951 (App. Div. 2002), *certif. denied* 172 N.J. 178 (2002) matter and how, in the state court, Coast would be eligible for relief(and, in fact, obtain a judgment), but somehow ineligible for relief in the Federal Courts. The *VW Credit v. Coast* matter, like this one, was a non-termination matter. In that matter, despite VOA's and AOA's urging, the Appellate Division did not impose N.J.S.A. 56:10-9 or alleged non-compliance as a barrier to Coast obtaining judgment. In fact, the Appellate Division held that Coast was a franchisee **with all of its rights intact** including the right to transfer its franchises, pursuant to the New Jersey Franchise Practices Act. How can a dealership have right to transfer its franchises under the act and not have the right to a fair and equitable vehicle allocation? Applying the Third Circuit's rule, that Appellate Division judgment could not stand. It is the Third Circuit, however, that was totally wrong.

Coast is not asking this Court to ignore N.J.S.A. 56:10-9 or carve some novel exception. The question is not just whether N.J.S.A. 56:10-9 applies, but **how it applies**. Where is the requirement that N.J.S.A. 56:10-9 be embodied in a separate jury instruction and verdict sheet question? Given the jury instruction on the duty of good faith, it could

be said that N.J.S.A. **56:10-9 is already incorporated** inasmuch as the jury is required to lay blame with either the dealer or the franchisor in each case. **That is in order to find liability under the duty of good faith, the jury had to find that Coast had materially performed its obligations**:

> Section 56:10-9 provides that "[i]t shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto." Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions brought under § 56:10-7(e). To the contrary, § 56:10-9 provides a complete defense to a franchisor in "any action" brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement.

12a. One cannot read one sentence of a lengthy statute, divorced from its context and divorced from the common law contract law and simply divine the "terms normal meaning." The Third Circuit's decision stands for the unique holding that while VOA and AOA 1) did not terminate Coast's franchises during 1996-1997 (55a) and 2) could not terminate Coast's franchises in 1996-1997(55a), somehow VOA and AOA were excused, retroactively, from good faith performance. That notion is simply inconsistent with every tenet of contract law that deals with performance and breach of contracts. It could not be more plainly wrong.

VOA and AOA having stipulated (55a) that they did not attempt to and in fact could not terminate Coast's franchises, Coast was an "innocent franchisee":

> The plain meaning of § 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor. In *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 55 (N.J. 1981), the New Jersey Supreme Court construed the "good cause" language of § 56:10-5 as limiting termination of the franchise agreement under the NJFPA only in cases where the franchisee committed a breach. The New Jersey Supreme Court recognized that the plain meaning of the "good cause" provision supported the "legislative desire to protect the innocent franchisee when the termination occurs at the franchisor's convenience." Id. The same can be said of § 56:10-9 and its application to § 56:10-7(e). The statutory defense does not protect the franchisor from suit brought under § 56:10-7(e) by an "innocent franchisee."

12a. The Third Circuit's reference to an "innocent franchisee" is overly simplistic and highlights the unsophisticated, inaccurate and incomplete analysis that the Third Circuit employed in examining this case. VOA and AOA stipulated in the jury instructions (55a) that **they elected, chose and were required** to stay in a relationship with Coast, which included performing in good faith. Then the jury determined that VOA and AOA tried to drive Coast out of business with unfair allocations. The New Jersey Franchise Practices Act,

as does the duty of good faith, prevents indirect, informal terminations, which are essentially "through the back-door." The only way a franchisor can relieve itself of its obligations to a franchisee is to terminate the franchise. There is no "in between." The Third Circuit's ruling however, is "in between." Unless and until a termination is accomplished the franchisor must perform in good faith. 58a. The Third Circuit's decision does not, in any way, recognize that immutable and unassailable maxim:

> Coast argues that § 56:10-9 is contrary to the common law duty of good faith and fair dealing as codified in § 56:10-7(e). Even if we assume that § 56:10-7(e) codifies the common law duty of good faith and fair dealing and that § 56:10-9 effects a change by providing a defense to franchisors not available at common law, we are not persuaded that § 56:10-9 is inconsistent with or inapplicable to actions brought under § 56:10-7(e).

13a. The citations by the Third Circuit in its decision (13a) are to terminations of a franchise, therefore, these cases do not deal with the issue that unless and until a franchise is terminated, the franchisee must be treated in good faith. 58a. And that is exactly what the *VW Credit, Inc. v. Coast* appeal stands for. The New Jersey Franchise Practices Act was not enacted to provide additional defenses to franchisors. Rather, it was enacted to enhance the protection available to franchisees:

> In New Jersey, statutes that impose duties or burdens, or establish rights, or provide benefits not

> recognized by common law, are subject to strict construction. *State v. International Fed'n of Prof'l and Technical Engrs.*, 780 A.2d 525 (2001). It is clear that if the statutory defense makes any change in the common law at all, it does so only with regard to those cases where the franchisee also breached the franchise agreement. And, as we have already discussed, § 56:10-9 so construed does not circumvent the Legislature's intended purpose for enacting NJFPA, that is to protect the innocent franchisee.

13a-14a. The Third Circuit totally misconstrued the concept of an "innocent franchisee." Innocent of what, one must ask? Contract law is not about innocence, it is about performance, breach, waiver, etc. 58a. Perhaps the concept of an "innocent franchisee" is relevant when a court is determining whether or not a franchisee should be terminated. **There is no principle of law, however, which allows one party of a contract to treat another in bad faith in the performance of the contract**. 14a, 58a.

II. IT WAS LEGAL ERROR, A MISSTATEMENT OF THE LAW AND AN INJUSTICE FOR THE JURY TO HAVE BEEN CHARGED ON N.J.S.A. §56:10-9 AND FOR THE VERDICT SHEET QUESTION 6 TO HAVE BEEN GIVEN WITH REGARD TO COUNT 18 OF COAST'S COMPLAINT (COAST'S CLAIM UNDER N.J.S.A. §56:10-7(E))

The erroneous jury instruction under N.J.S.A. §56:10-9 caused the jury to have to make impermissible, abstract, legal determinations. 53a-58a. In the case of Coast's claims, the jury was being called upon to make factual determinations following the New Jersey Model Jury Charge 4.10-18 on the duty of good faith and fair dealing. 43a-46a, 53a-58a. In the case of VOA's and AOA's purported defenses, the jury was asked to make legal determinations. 43a-46a. When one reviews the jury instructions prompted by N.J.S.A. §56:10-9, it is clear the jury was asked to engage in contract construction. 43a-46a, 53a-58a.

The jury properly rejected, as a factual matter, VOA's and AOA's allegations that Coast's own actions were the proximate cause of its inventory deprivation. 28a, 30a, 53a-58a. The jury determined that VOA and AOA breached the dealer agreement and treated Coast in an unfair and inequitable manner. 28a, 30a, 53a-58a. The jury determined that Coast was treated in bad faith by VOA and AOA and that VOA and AOA imposed *unreasonable standards of performance* upon Coast. 30a, 53a-58a.

Coast argued in its September 9, 2001 memorandum in opposition to the instruction on N.J.S.A. §56:10-9 that "In the present posture, collateral issues of contract construction are being thrown up to the jury for consideration. Rather, it is the jury's province to determine the facts of the case." (44a) and that "VOA and AOA are asking this Court to put an incorrect abstraction before the jury which will prejudice Coast's right to a fair determination based upon the evidence of the record." 45a. In fact, in pretrial *in limine* arguments, Coast's Counsel argued "I don't think that that can be a question that's posed to the jury as an issue to decide[...] ["]Has Coast breached its contract or has it made a misrepresentation ["] and use that as a defense to our [unrelated vehicle allocation] damages claim [?]" 63a; see also, VOA/AOA summation 59a. In fact, the jury's determination under Verdict Sheet Question 6 was wholly inconsistent with its factual findings as to Coast's allocation claims. 30a, 53a-58a.

The New Jersey Franchise Practices Act protects franchisees from bad faith performance including indirect termination of their franchises. That part of The New Jersey Franchise Practices Act known as N.J.S.A. §56:10-7(e) prohibits a franchisor from imposing "unreasonable standards of performance" on a franchisee. 53a-58a("The New Jersey Act prohibits manufacturers from imposing adverse conditions upon their franchisees, which amount to unreasonable standards of performance.") In *Gelardi v. Miller Brewing Company,* Judge Ackerman explained that N.J.S.A. 56:10-7(e) "can be read as a codification of a franchiser's responsibility to comply with the covenant of good faith and fair dealing." *See Carlo C. Gelardi v. Miller Brewing Company,* 502 F. Supp. 637, 653 (D.N.J. 1980).

In its September 9, 2001 memorandum in opposition to the jury instruction under N.J.S.A. §56:10-9 (43a-46a), Coast cited the seminal case on substantial compliance, *Amerada Hess Corp. v. Quinn,* 143 N.J. Super. 237, 253 (1976). The Superior Court in *Amerada Hess* found the underlying principles for The New Jersey Franchise Practices Act in principles of common law contract law.[1]

The authority of *Stamato & Co. v. Borough of Lodi* reinforces the long-established principle that a party must terminate or repudiate a contract or be left solely with a claim for damages:

> In a case of "'material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract...the injured party has a genuine election offered him of continuing performance or of ceasing performance, and **any action indicting an intention to perform will operate as a conclusive choice**, not indeed depriving him of a right of action for the breach which has already taken place, **but depriving him of any excuse for ceasing performance on his own part**. 5 Williston on Contracts(Rev. Ed. 3749)

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[1] Judge Becker, in delivering the Third Circuit's opinion in *General Motors v. The New A.C. Chevrolet*, 263 F. 3d. 296 (2001), cited the same passage from *Amerada Hess* cited in Coast's letter memorandum at 608a at this Court's footnote 8, 263 F.3d 317.

Stamato v. Borough of Lodi, 4 N.J. 14, 21 (1950). (emphasis supplied). This is 180 degrees from the position taken by VOA and AOA. 55a. While the party asserting the right to terminate might ultimately be able to sue for damages for its period of inaction, a failure to terminate is a conclusive waiver of that particular right and there is no allowance for a retroactive termination or failure to perform. 55a.

As Coast had anticipated in its initial brief to the Third Circuit, VOA and AOA referred to the Third Circuit's decision in *General Motors Corp. v. The New A.C. Chevrolet, Inc.,* 263 F.3d 296, 320 (3rd Cir. 2001) for their opposition. *G.M. v. New A.C.,* however, is of no support to their argument in this particular case. *GM v. New A.C.* was a "termination" case. Coast has argued, pretrial, during trial, post-trial and in its appeal to the Third Circuit that common law contract law, the law of the duty of good faith and fair dealing and The New Jersey Franchise Practices Act all stand for the proposition that **unless and until a contract is terminated**, the parties **must perform in good faith**.

The Third Circuit erred in failing to require that VOA and AOA demonstrate a factual relationship between Coast's affirmative allocation claims decided in Coast's favor and the purported substantial non-compliance alleged by VOA and AOA as a defense to that affirmative claim. This further indicated that instruction under N.J.S.A. §56:10-9 and Verdict Sheet Question 6 were erroneous. Coast has not argued that N.J.S.A. §56:10-9 is irrelevant in all cases. This was not a franchise termination case, it was an allocation case that dealt with the performance of the contract. In a franchise termination case, where a proper notice of termination has

been issued, the franchisor argues the grounds for termination that are set forth in the franchise agreement. At argument on *in limine* motions, well before jury instructions were discussed, Coast raised the fact that there was no connection between VOA's and AOA's arguments under N.J.S.A. §56:10-9 of essentially alleged technical breaches of contract and the failure of Coast to receive a fair and equitable allocation of vehicles. 60a-64a.

Bolstered by the knowledge that the district court was going to give an incorrect jury instruction, VOA and AOA made pure legal arguments in their closing. 58a-59a.

The jury did not find a factual nexus between VOA's and AOA's allegations and Coast's ability to acquire more inventory. 28a-30a, 53a-58a. It is clear that the jury blamed VOA and AOA for Coast's slashed allocation and concluded that VOA and AOA were trying to drive Coast out of business. 28a-30a, 53a-58a.

According to the district court's presentation of the jury instructions and verdict sheet, every single action brought by a franchisee against a franchisor would eventually boil down to a legal verdict sheet question under N.J.S.A. §56:10-9 as to any possible non-compliance (related or unrelated to the franchisee's complaint) that a franchisor could dream up. This would be the case no matter how small or how big or what the subject matter of the complaint was—whether the issue was warranty reimbursement from a franchisor(in the case of automobile dealership service departments), display of signage and trademarks, etc. 64a. That is a legal fiasco

and that is exactly what happened to Coast in the district court.

III. THE MOST GLARING ERROR IN THE THIRD CIRCUIT'S DECISION IS THAT DURING THE SAME PERIOD, IN THE STATE COURT, COAST OBTAINED A JUDGMENT AGAINST VOA AND AOA UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT, SHOWING AS A MATTER OF LAW, THAT COAST WAS ELIGIBLE FOR RELIEF UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT IRRESPECTIVE OF VOA'S AND AOA'S CONTENTIONS OF ALLEGED NON-COMPLIANCE.

VOA and AOA contend that the Superior Court of New Jersey, Appellate Division's legal determination that Coast's method of purchasing vehicles was substantially compliant is of no moment. VOA and AOA are incorrect.

In April 1999, VOA and AOA issued notices of termination, alleging that Coast was substantially non-compliant with respect VOA's and AOA's wholesale floor-plan line of credit requirement. The Superior Court, Law Division, enjoined the termination attempts. Thereafter, as a matter of law, the Superior Court, Appellate Division held that Coast buying cars with the equivalent of C.O.D. is not a material breach of its obligations. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957(**"This is not a case where a franchisee was in substantial breach of its obligations under the franchise agreements..."**(emphasis supplied) Of

course, VOA and AOA do not cite to that part of the Appellate Division decision, which is a crystal clear statement of law.

Just as the district court noted in its *in limine* arguments that VOA and AOA "can say they felt that [Coast was] in breach. As to whether there actually was a breach, that's a legal issue (61a)" the issue before the Appellate Division was one of law. It is of no moment that the Appellate Division was looking at whether or not a preliminary injunction was warranted or not as opposed to other relief. As a matter of law, Coast was either in substantial breach or it was not. In this case the Appellate Division held that Coast was not. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. No amount of revisiting the situation could or should change the legal outcome as to whether or not, for the purposes of The New Jersey Franchise Practices Act, that buying vehicles in the manner that Coast did was substantially compliant or not. *Id.* Until the Appellate Division or Supreme Court changes or modifies the holding in the *VW Credit v. Coast* appeal, buying vehicles on C.O.D. or its equivalent is substantially compliant. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. The Appellate Division noted that Coast paid for all the vehicles it received and did not owe Volkswagen or Audi any money. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. As noted above, it appears that the *VW Credit v. Coast* matter is the only New Jersey Franchise Practices Act case that deals with wholesale lines of credit, which is the precise issue in this case.

It is worthy of note that the Volkswagen and Audi dealer agreements list specific grounds for termination of the

agreement. **Not one of the grounds for termination pertains to floor plan lines of credit**. The Third Circuit disregarded that the New Jersey Appellate Division held as a legal matter that Coast (and other similarly situated franchisees), had its rights intact and had protected and defensible rights including the right to seek and obtain relief under The New Jersey Franchise Practices Act.

In the *VW Credit v. Coast v. VOA and AOA* appeal, the Appellate Division held that, as a matter of law, since Coast's method of purchasing vehicles was substantially compliant, the Superior Court properly enjoined the termination of Coast's franchises. *VW Credit v. Coast*, 346 N.J. Super. 336, 787 A. 2d 957. In fact, on April 5, 1999, the district court expressly forbid the termination notices from being litigated in this case. 35a.

The Appellate Division further held that the termination attempt having been enjoined, Coast remained a franchisee with enforceable rights (*see VW Credit v. Coast*, 346 N.J. Super. 337, 787 A.2d 957) including the right to prevail against VOA and AOA for wrongfully withholding consent to allow Coast to sell its Volkswagen and Audi franchises. Where was N.J.S.A. §56:10-9 stopping Coast's right to transfer its franchises? If the Third Circuit's decision in this matter were correct and N.J.S.A. §56:10-9 was a black and white hurdle that needed to be dealt with in the manner that they argue, then Coast could not have won the right to transfer its franchises. The Superior Court Appellate Division and the Supreme Court of New Jersey would have necessarily have to have made the wrong decision.

Throughout, Coast, as a franchisee with rights, had a right to fair and equitable allocation of vehicles (28a) and had a right not to have unreasonable standards of performance thrust upon it (30a). *See VW Credit v. Coast,* 346 N.J. Super. 337, 787 A.2d 957.

The Third Circuit failed to answer a crucial question that Coast challenged the Third Circuit to answer: after the September 2001 trial, what are Coast's rights under The New Jersey Franchise Practices Act? If the Third Circuit's decision's were applied Coast would be in some type of grey area where Coast was a franchisee, Coast has not been terminated, yet it cannot recover against VOA and AOA even when it proves by a unanimous jury that unreasonable standards of performance were thrust upon it?

Based upon the theory that N.J.S.A. 56:10-9 is alleged to be a "defense," to a claim, the only reasonable conclusion is that the legislature intended the "defense" to be germane to the claim being made as any other "defense" in a contract action would otherwise have to be.

IV. EVEN IF AN INSTRUCTION AND VERDICT SHEET QUESTION UNDER N.J.S.A. §56:10-9 WERE PERMISSIBLE ON COUNT 18 OF COAST'S COMPLAINT, THE SUBSTANTIAL AND CREDIBLE WEIGHT OF EVIDENCE DID NOT SUPPORT A FINDING AGAINST COAST.

Coast's position is that the issues surrounding N.J.S.A. §56:10-9 represented improper legal questions being posed to the jury. To the extent that any part is deemed to be a factual question, the jury's determination on the purported

issue of "substantial non-compliance" was also against the weight of the evidence. 30a Verdict Sheet Question 6.

Given the Appellate Division's ruling, as a matter of law, the jury's finding was against the weight of the evidence, since under The New Jersey Franchise Practices Act, the allegations made by VOA and AOA, as a matter of law, do not constitute "substantial non-compliance." *See VW Credit v. Coast*, 346 N.J. Super. 336. Therefore, not only was the submission of an instruction regarding N.J.S.A. §56:10-9 error, VOA and AOA did not present evidence to the jury to support a finding that Coast was substantially non-compliant.

VOA and AOA made arguments that simply amounted to technical defects or omissions, which by definition, are not substantial non-compliance. On Verdict Sheet Questions 1(28a) and 5(30a), the jury made factual findings that VOA and AOA 1) had breached the dealer agreement by giving Coast an unfair and inequitable allocation of vehicles 2) that VOA and AOA violated the duty of good faith and fair dealing 3) that VOA and AOA indirectly attempted to drive Coast out of business. 53a-58a. Furthermore, in order to find as it did on Verdict Sheet Question 5(30a) the jury had to find that 1) Coast was giving an honest effort in performing its contractual obligations and 2) that VOA and AOA were not. 53a-58a.

Regarding the issue of Coast's alleged technical breach with respect to its wholesale floor-plan line of credit and alleged breach with respect to its dealer application, absolutely no link was articulated by VOA and AOA or made by the jury to Coast's performance as a dealer, nor, over Coast's

objection, did the district court require a link. 53a-58a, 63a-64a.

The jury was instructed that a breach by a dealer, in order to be material, must have an effect on the trade name of the franchisor. 54a-55a. VOA and AOA did not present one scintilla of evidence, no less a preponderance of the evidence, that anything allegedly done by Coast had, or even potentially could, affect its trade name within the meaning of the concept of "substantial non-compliance." VOA's Chuck Domke was the VOA representative who dealt most frequently with Coast from December 1995 through September 1997. He was what is known as the "Area Executive" for Coast's dealership and the surrounding Volkswagen dealers. VOA's Chuck Domke, on direct examination, not only on cross-examination, **but on direct examination**, testified that Coast always had excellent Customer Satisfaction ratings. 50a. These are airtight admissions that nothing complained of by VOA and AOA could meet the standard of "substantial non-compliance." Furthermore, Domke admitted that he never even had a discussion with Coast as to whether or not it had the money to buy more vehicles. 50a. With an historic and evidentiary record to draw from, the jury cannot speculate contrary to the airtight admissions of VOA's own personnel.

The jury determined, as a factual matter, that Coast did not get its fair share allocation of vehicles and that failure was attributable to VOA and AOA and not Coast's conduct. 28a, 30a, 53a-58a. There was absolutely no evidentiary basis presented through any document that anything in Coast's conduct did or could pose a risk of harm to the Volkswagen or

Audi name. 50a. In fact, the only testimony was that Coast was a credit to the Volkswagen and Audi name. 50a. Since VOA and AOA's personnel admitted Coast was a credit to the name and no evidence was brought in, whatsoever, contrary to that, the jury had no evidence from which it could conclude that Coast had ever caused injury to VOA's and AOA's name.

VOA and AOA cannot make the circular argument that the mere technical issue pertaining to Coast's floor-plan line of credit could affect their trade name, since the jury found that the proximate cause of Coast's lack of inventory was VOA's and AOA's fault and not Coast's. The jury found that **VOA's and AOA's actions imposed unreasonable standards of performance on Coast**. 28a(Verdict Sheet Question 1), 30a(Verdict Sheet Question 5), 53a-58a. **In fact, AOA's Brendan Bouch, through deposition read, testified that Coast's method of purchasing vehicles was perfectly fine.** 52a.

Opening statements and closing arguments of counsel do not provide an evidentiary basis for such a finding. Therefore, VOA's and AOA's counsel's editorials and characterization of the evidence do not provide a basis for an evidentiary determination by the jury:

[VOA's Counsel's Opening]

> The problems that happened at Coast were all the result of selling cars out of trust, not having enough money, filing bankruptcy. As you'll see

> the minute they got out of bankruptcy, they started to get a lot more cars.[2]

58a. Besides VOA's and AOA's counsel's opening and closing statements, there was nothing in the witness testimony which could have formed the basis for a finding of "substantial non-compliance." VOA and AOA argued in their opposition brief that their second alleged "substantial non-compliance" formed a sufficient basis for a jury finding. That argument fails equally. All that VOA and AOA did was make an argument of a technical breach. VOA and AOA contended that Mr. Shansab's original financial investment of funds in Coast in 1991(six years before litigation began with VOA and AOA) could not be considered his "personal funds" because in 1991 he had obtained the money from third party friends of his. That is what VOA's and AOA's entire argument as to this alleged breach centers on—the "characterization"—of Mr. Shansab's money. The argument does not center on whether the money was invested in the dealership, because no one contends that Mr. Shansab did not make the proper investment in the dealership.

While VOA and AOA cite to the district court's bench opinion on the rescission counterclaim as support, that reliance fails. The bench opinion dealt solely with Mr. Shansab's dealership application in 1991 and entirely different document than the 1997 renewal Dealer Agreement,

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[2] It is important to note the admission by counsel that despite the duty of good faith and despite Chapter 11 protection, VOA and AOA withheld inventory while Coast was in Chapter 11.

which was in effect in 2001. The bench opinion did not look at the subsequent dealer agreements and determine whether or not a breach or substantial breach of the terms of the dealer agreements occurred or whether or not any of the information connected with those agreements was inaccurate. The subsequent dealer agreements can only be breached if there is a material misrepresentation of a fact **relied upon** by the franchisor in issuing the dealer agreements as set forth in Third Circuit Appendix pages 1546a-1547a. VOA and AOA, rather, seem to argue for some type of perpetual breach theory, that Coast would allegedly be continuously and forever in breach of its renewed dealer agreements for something that was stated in its dealer application in 1991. There is no such known theory in contract law. Coast's original dealership application and the subsequent renewal of the dealer agreements are apples and oranges. To the extent that VOA and AOA are going to argue that the evidence supported the finding of a "substantial breach" of specific agreements, then they must be required to demonstrate which language of each agreement was breached, what information formed the basis of the breach and what evidenced that specific breach at trial. The district court required none of this from VOA and AOA. The 1997 Volkswagen Dealer Agreement(a two page agreement signed by the dealer)(Third Circuit Appendix pages 1546a-1547a) and the Volkswagen Standard Provisions(a booklet that sets forth the general guidelines for the relationship) (Third Circuit Appendix pages 1551a-1579a) relate to one another, not back to Coast's original application to World-Wide Volkswagen, an independent distributor unrelated to VOA and AOA. In fact, nowhere do the Volkswagen Dealer Agreement (Third Cir-

cuit Appendix pages 1546a-1547a) or the Volkswagen Standard Provisions (Third Circuit Appendix pages 1551a-1579a) refer back to a dealer's initial application. It is not a breach of the Volkswagen Dealer Agreement or the Volkswagen Standard Provisions if a dealer's original application allegedly had an error, mistake or misstatement in it. It is simply a 100% legal impossibility for VOA's and AOA's contention raised with respect to Coast's 1991 dealer application to be a breach of the dealer agreements executed in 1992 and 1997, respectively. There is nothing in the Volkswagen Dealer Agreement (Third Circuit Appendix pages 1546a-1547a) and the Volkswagen Standard Provisions (Third Circuit Appendix pages 1551a-1579a) that pertains to the original source of a dealer's funds. Not one single word. The Third Circuit completely glossed over this. A termination of a franchise can only take place if a dealer fails to comply with the requirements of a franchise agreement then in effect. *See* N.J.S.A. 56:10-5. Likewise, since VOA and AOA argue for a hyper-technical application of N.J.S.A. 56:10-9, the precise language of N.J.S.A. 56:10-9 does not permit "substantial non-compliance" to be asserted for an alleged past breach, the language is present tense concerning the agreement then in effect. There is not one scintilla of evidence or argument in the record from which it could be concluded by a jury that the issue pertaining to Mr. Shansab's source of funds in 1991 could serve as a breach of the subsequent dealer agreements, agreements which were executed in 1992 and 1997. There is no legal basis for such an argument to serve as a defense against VOA's and AOA's adjudicated allocation discrimination and failure to comply with the duty of good faith and fair dealing which occurred

after December 1995. There was not one scintilla of evidence that the information in Coast's dealer application submitted to the unrelated corporation World Wide Volkswagen in 1991 later posed a risk to VOA's and AOA's trade name, since VOA's and AOA's representatives testified that Coast was an excellent dealer.

V. AS TO COUNT 17 OF PLAINTIFF'S COMPLAINT, THE JURY'S FINDING ON VERDICT SHEET QUESTION 2 WAS AGAINST THE SUBSTANTIAL WEIGHT OF THE CREDIBLE EVIDENCE OF THE RECORD

Coast's Count 17 of its complaint was under the Automobile Dealers' Day in Court Act 15 U.S.C. §1221 et. seq. The jury concluded by a preponderance of the evidence that VOA and AOA had violated the dealer agreement by failing to give Coast a fair and equitable allocation of vehicles (28a Verdict Sheet Question 1) and that VOA and AOA tried to drive Coast out of business (30a, Verdict Sheet Question 5). In the Third Circuit briefing, VOA and AOA corroborated Coast's position. VOA and AOA made reference to a statement by Coast that during the Chapter 11 that Coast believed it had to offer its dealerships for sale. But for VOA's and AOA's adjudicated wrongful deprivation of vehicles driving Coast almost to the point of liquidation, there would have been no reason for Coast to believe that it had to sell its dealership.

The actions of VW Credit, VOA's and AOA's subsidiary, simply provide the proper context to demonstrate why VOA and AOA would have a reason to give Coast an unfair allo-

cation of vehicles and try to drive it out of business and coerce to surrender its franchises against its will. Until VW Credit acted against Coast, Coast had no problems with VOA and AOA. The jury, however, found that after December 1995, VOA and AOA failed to provide a fair and equitable allocation of vehicles and that was an attempt to drive Coast out of business.

After finding that VOA and AOA breached their contract with Coast and failed to provide Coast with a fair and equitable allocation of vehicles (28a, Verdict Sheet Question 1), the jury did not respond in the affirmative to Verdict Sheet Question 2 which asked the jury to determine whether or not VOA's and AOA's actions were coercive were within the meaning of the Automobile Dealers' Day in Court Act. (28a Verdict Sheet Question 2). Yet the jury clearly found that VOA's and AOA's actions were an attempt to drive Coast out of business. 30a (53a-60a). Both Coast's management and its dealer principal testified that they were told by Volkswagen's Chuck Domke that Coast was not going to get any more vehicles. Likewise, Coast's management and its dealer principal testified that during the periods of deprivation of vehicles, VOA pressured Coast to sell back its franchises. In the jury instructions, language was inserted that a manufacturer is free to advance its own interests and that it may urge compliance with its purported franchise obligations and that such conduct is not a violation of the statute. *See General Motors v. New A.C.*, 263 F. 3d 327. While such statements may not be a per se violation of the statute, *General Motors v. New A.C.* states that in making such statements and in advancing its alleged interests, a franchisor *may still* be acting coercively and be in violation of the statute if

its urgings and actions are pretext, which is contrary to the district court's charge in this matter.

The requirement for The Automobile Dealers' Day in Court Act is that the underlying *acts* of coercion or intimidation be real or palpable. The jury agreed with Coast's argument that it had been wrongfully and intentionally deprived of inventory for the purposes of trying to drive it out of business. 30a. (53a-58a). VOA and AOA, itself, introduced into evidence the Order appointing a Chapter 11 trustee to liquidate Coast's dealership as a going concern or, if necessary, piece by piece. It was unrebutted that Coast received only a handful of vehicles in the next four months after the order was entered. It was unrebutted that days after the Chapter 11 was dismissed, Coast started receiving vehicles again. VOA and AOA offered no explanation for this whatsoever.

CONCLUSION

Based upon the within argument, Coast respectfully requests that its petition for a writ of certiorari to this Court be accepted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A – ORDER DENYING PETITION FOR REHEARING EN BANC, FILED FEBRUARY 25, 2005

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

Before:SCIRICA, *Chief Judge,* SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY AMBRO, SMITH, FISHER, and VAN ANTWERPEN *Circuit Judges.*

ORDER

The petition for rehearing *en banc* filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: 25 February 2005

APPENDIX B – JUDGMENT, FILED JANUARY 25, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

On Appeal from the United States District Court
for the District of New Jersey (D.C. No. 97-cv-02601)
District Judge: Hon. Garrett E. Brown

Before: Roth, Ambro, and Chertoff, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1 (a) on March 22, 2004.

On consideration whereof,

IT IS NOW HEREBY ADJUDGED and ORDERED that the judgment of the district court entered October 30, 2002, be and the same is hereby affirmed. Costs taxed against appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

_____

Acting Clerk

Dated: 25 January 2005

APPENDIX C – OPINION OF THE COURT, FILED JANUARY 25, 2005

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 97-cv-02601) District Judge: Hon. Garrett E. Brown
Submitted Under Third Circuit LAR 34.1(a)
on March 22, 2004

Before: Roth, Ambro, and Chertoff, *Circuit Judges.*

(Filed: January 25, 2005)

OPINION OF THE COURT

ROTH, *Circuit Judge.*

This case concerns a jury verdict in favor of Volkswagen of America and Audi of America (VOA/AOA) on two claims brought by VOA/AOA's franchisee, Coast Automotive Group, Ltd. Coast alleged that VOA/AOA's failure to make a fair and equitable allocation of motor vehicles to Coast after Coast lost its line of credit and went into bankruptcy violated both the New Jersey Franchise Practices Act (NJFPA), N.J. Stat. Ann. § 56:10-7(e), and the Automobile Dealers' Day in Court Act (Dealers' Act), 15 U.S.C. § 1221 et seq. Although the jury decided that VOA/AOA violated § 56:10-7(e) of the NJFPA by failing to make a fair and equitable allocation, it also found that VOA/AOA was not liable because Coast failed to substantially comply with the franchise agreement. As for the Dealers' Act claim, the jury found that VOA/AOA's conduct was not an attempt to coerce or intimidate Coast into giving up or selling its franchise. The main issues we face on this appeal are whether the jury instruction and related verdict sheet question addressing § 56:10-9 as a complete defense to liability under the NJFPA were an accurate statement of the law, and whether the jury verdict on VOA/AOA's defense to the NJFPA claim and the verdict on the Dealers' Act claim were against the weight of the evidence.

I. FACTUAL AND PROCEDURAL HISTORY

Coast was an authorized retailer of Volkswagen and Audi vehicles that owned new vehicle dealerships in Toms River, New Jersey. Beginning in 1991, Volkswagen Credit, Inc. (VCI), a subsidiary of VOA/AOA, provided Coast with floor plan financing so that Coast could purchase vehicles for its inventory. In December 1995, VCI called Coast into default under the provisions of their agreements and, soon thereafter, filed a state court action in the Law Division of a New Jersey Superior Court seeking repayment of the debt, *VW Credit, Inc. v. Coast Automotive Group, Ltd., et al.*, Docket No. OCN-L-1162-96. On December 15, 1995, Coast filed a Chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. The bankruptcy action was dismissed on September 18, 1997. Although Coast lost its wholesale line of credit during the pendency of the bankruptcy, it continued to acquire inventory by paying with checks or drafts against its regular checking account or through a series of cash collateral orders that allowed Coast to use the proceeds from the sale of new vehicles to purchase replacement vehicles. Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, however, VOA/AOA representatives had to intervene to get new vehicles assigned to Coast, and then arrange for and confirm payment and shipment on each new vehicle. This process both delayed and reduced the allocation of new vehicles to Coast. Coast also complained that, in order to force the dealership to fold, VOA/AOA was deliberately giving it vehicles that were hard

to move such as cars of an undesirable color or cars with stick shifts.

In January 1997, Coast filed a complaint in the Bankruptcy Court against VCI, several VCI employees, and VOA/AOA, essentially alleging that VCI wrongfully called Coast into default. That action was withdrawn from the Bankruptcy Court in May 1997 and transferred to the United States District Court for the District of New Jersey. In April 1998 and October 1999, the District Court granted VCI summary judgment on all counts of Coast's initial sixteen count complaint. Coast appealed.

Meanwhile, Coast amended its complaint adding two claims against VOA/AOA, alleging that VOA/AOA failed to provide sufficient inventory to Coast during the course of Coast's Bankruptcy proceedings in violation of the NJFPA and the Dealers' Act. VOA/AOA amended its Answer in October 1999 to assert a counterclaim under New Jersey law seeking equitable rescission of its franchise agreements with Coast.[1] The District Court held a jury trial in September 2001 on the NJFPA and Dealers' Act claims. The jury returned its verdict in favor of VOA/AOA on both of Coast's statutory causes of action. On October 30, 2002, the District Court entered judgment in VOA/AOA's favor on the NJFPA and Dealers' Act claims. Earlier in 2002, this Court had affirmed

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[1] On October 30, 2002, the District Court rendered a bench opinion on VOA/AOA's counterclaim, finding that although Coast made material misrepresentations in its franchise application, VOA/AOA was not entitled to rescission because it failed to prove damages. Neither party has appealed the District Court's ruling.

in part and vacated in part the District Court's grant of summary judgment in VCI's favor, remanding the vacated claims against VCI for trial. Judgment became final on January 8, 2003, when the District Court dismissed the remanded claims against VCI as moot after Coast had prevailed in the state court action on identical claims against VCI.

As for the state court action, it had proceeded on a parallel course with the Federal action. In April 1998, Coast impleaded VOA/AOA, alleging the same NJFPA and Dealers' Act claims as those raised in the federal action, along with other statutory and common law claims against VCI. VOA/AOA asserted an identical counterclaim for equitable rescission of its franchise agreements. In July 2002, the state court denied VOA/AOA's summary judgment motion seeking claim and/or issue preclusion as to the NJFPA and Dealers' Act claims and the case proceeded to trial in August 2002.[2] At the conclusion of the presentation of evidence, Coast's NJfPA claims against VOA/AOA were dismissed with prejudice at Coast's request. The jury found in VOA/AOA's favor on the Dealers' Act claim. The state court entered judgment in VOA/AOA's favor on April 7, 2003. Coast's state court appeal is pending.

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[2] We find no merit in VOA/AOA's argument that the judgment in the state court action is entitled to *res judicata* effect, precluding further proceedings in this Court. VOA/AOA's motion to preclude the state action on grounds of *res judicata* has already been rebuffed by the New Jersey Superior Court. We agree with Coast that VOA/AOA's appeal in this Court of the first adjudication does not constitute a third forum in which the NJFPA and Dealer's Act claims are being litigated.

II. JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.[3] We employ plenary review to determine whether jury instructions misstate a legal standard. *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989). We look at the entire set of instructions to the jury and ascertain if they adequately contain the law applicable to the case and properly apprise the jury of the issues in the case. *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir.1995). A jury verdict will not be overturned unless the record is critically deficient of that quantum of evidence from which a jury could have rationally reached its verdict. *Swineford v. Snyder County*, Pa., 15 F.3d 1258, 1265 (3d Cir. 1994).

III. DISCUSSION

A. The Jury Instruction and Verdict Sheet

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[3] Shortly before trial in the federal action 2001, Aspen-Knolls Automotive Group, LLC, the contract purchaser of Coast's franchises, intervened in the federal action, seeking a ruling that any judgment or other relief obtained by VOA/AOA on its equitable rescission counterclaim would not adversely impact Aspen's right acquire Coast's Volkswagen and Audi Franchises. None of the District Court orders expressly disposed of the complaint. Upon review of the parties' responses to our inquiry as to the status of the Aspen complaint, we are now satisfied that we have jurisdiction to consider the matter. VOA/AOA did not prevail on its counterclaim, and thus, it was not necessary for the District Court to adjudicate Aspen's complaint in intervention and the Judgment and Order closing the federal action entered on January 8, 2003, was final as to all claims.

Coast's main contention is that it was entitled to a verdict on the NJFPA claim because § 56:10-9 is not a defense to Coast's 1996-1997 allocation claims. It argues that the jury instruction and verdict sheet question completely misstated the law and essentially deprived Coast of its proper NJFPA claim under § 56:10-7(e). According to Coast, the District Court erred in instructing the jury to excuse VOA/AOA from all liability based on Coast's alleged substantial noncompliance with the franchise agreement because VOA/AOA never elected to terminate the contract in the relevant time period and because no factual nexus existed between Coast's inequitable allocation claim and the alleged material breach.

The question before us is whether § 56:10-9 applies in actions brought under § 56:10-7(e). The parties have cited no New Jersey law on point and we have found no decision of the New Jersey Supreme Court, or of lower state courts, on point. We must, as a federal court asked to decide an open question of state law, look to the fundamental principles of statutory construction that would inform the New Jersey court's consideration of the issue. New Jersey abides by well-known rules of statutory construction. In New Jersey, when a statute is clear and unambiguous on its face, "the sole function of the courts is to enforce it according to its terms." *Velazquez v. Jiminez*, 798 A.2d 51, 61 (2002). "All terms in the statute should be accorded their normal sense and significance." Id. The "overriding objective in determining the meaning of a statute is to effectuate the legislative intent in light of the language used and the objectives sought to be achieved." *McCann v. Clerk of the City of Jersey City*, 771

A.2d 1123, 1128 (N.J. 2001) (quoting *State v. Hoffman*, 695 A.2d 236, 243 (N.J. 1997)).

Section 56:10-9 provides that "[i]t shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto." Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions brought under § 56:10-7(e). To the contrary, § 56:10-9 provides a complete defense to a franchisor in "any action" brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement.

The plain meaning of § 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor. In *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 55 (N.J. 1981), the New Jersey Supreme Court construed the "good cause" language of § 56:10-5 as limiting termination of the franchise agreement under the NJFPA only in cases where the franchisee committed a breach. The New Jersey Supreme Court recognized that the plain meaning of the "good cause" provision supported the "legislative desire to protect the innocent franchisee when the termination occurs at the franchisor's convenience." Id. The same can be said of § 56:10-9 and its application to § 56:10-7(e). The statutory defense does not protect the franchisor from suit brought under § 56:10-7(e) by an "innocent franchisee.

This Court and federal district courts have recognized that § 56:10-9 allows a franchisee's substantial noncompliance to serve as a complete defense to any action brought under the NJFPA. See *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 321 n. 11 (3d Cir. 2001); *In re The Matterhorn Group, Inc.*, Nos. 97B 41274-97B 41278, 2002 Bankr. Lexis 1275 (Bkr. S.D.N.Y. November 15, 2002); *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F.Supp. 276, 286 (S.D.N.Y. 1991) ("It is a defense to a claim brought under the act [NJFPA] by a franchisee that the franchisee has failed to comply substantially with the requirements imposed by the franchisor").

Coast argues that § 56:10-9 is contrary to the common law duty of good faith and fair dealing as codified in § 56:10-7(e). Even if we assume that § 56:10-7(e) codifies the common law duty of good faith and fair dealing and that § 56:10-9 effects a change by providing a defense to franchisors not available at common law, we are not persuaded that § 56:10-9 is inconsistent with or inapplicable to actions brought under § 56:10-7(e). In New Jersey, statutes that impose duties or burdens, or establish rights, or provide benefits not recognized by common law, are subject to strict construction. *State v. International Fed'n of Prof'l and Technical Engrs.*, 780 A.2d 525 (2001). It is clear that if the statutory defense makes any change in the common law at all, it does so only with regard to those cases where the franchisee also breached the franchise agreement. And, as we have already discussed, § 56:10-9 so construed does not circumvent the Legislature's intended purpose for enacting NJFPA, that is to protect the innocent franchisee.

Accordingly, we conclude that the District Court did not err in its instruction to the jury with regard to the NJFPA statutory defense. The District Court accurately stated that VOA/AOA cannot be held responsible under the NJFPA if Coast did not substantially comply with the franchise agreement. And we find that jury question 6 did not misstate the law in asking "did Defendant's (sic) prove by a preponderance of the evidence that Plaintiff failed to substantially comply with requirements of the Franchise Agreement?"

B. The Sufficiency of the Evidence.

At trial, VOA/AOA offered evidence that Coast failed to substantially comply with its obligations under the franchise agreements in two ways. First, Coast failed to maintain the required financial arrangements for the purchase of new vehicles. Second, Coast made material misrepresentations about its financial ability when it applied to become a dealer. Coast argues that the verdict as to Coast's substantial noncompliance on VOA/AOA's first ground was against the weight of the evidence as a matter of law because Coast's method of purchasing vehicles during the bankruptcy period was found by the Appellate Division of the New Jersey Superior Court to be substantially compliant.

Our review of a jury's verdict is limited to determining whether some evidence in the record supports the jury verdict. As VOA/AOA correctly noted, jury question 6 did not require the jury to specify which one of the two bases for the defense they relied on. For our purposes we need only find the evidence sufficient as to one of the proffered bases. We agree with VOA/AOA that the New Jersey Superior Court's

statement in the context of a preliminary injunction proceeding has no bearing on the facts adduced at trial in this case, and we find that there is sufficient evidence supporting VOA/AOA's theory that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles.

But even assuming that Coast was substantially compliant with regard to its method of purchasing vehicles, we find the evidence is sufficient to support the verdict based on Coast's substantial noncompliance in materially misrepresenting its financial ability in the dealer application. We note that Coast does not offer any argument with regard to the insufficiency of the factual evidence on the material misrepresentation ground. Coast only contends that such a "breach" was not material. We disagree. Under § 56:10-6, a franchisor may reject a dealership's application to transfer a franchise based on lack of financial ability of the prospective transferee. As in transfer of dealership cases, the prospective franchisee's financial ability is a key factor in the franchisor's decision to grant a dealership in the first instance. Ensuring that a prospective dealer has the necessary financial resources to make the franchise succeed ultimately protects the trade name, image, and good will of the franchisor. See A*merada Hess Corp. v. Quinn*, 362 A.2d 1258, 1266 (N.J. Super. 1976) (defining substantiality of noncompliance in terms of its effect or potential effect on the franchisor's trademark, trade name, image, and good will).

Here, Tamim Shansab and Nasir Shansab represented on the dealer application that their personal investments of $1.6 million and $400,000 respectively were unencumbered. No-

where did they disclose that the money actually came from investors in Japan. In a separate agreement with these investors, Tamim Shansab agreed to repay $1.7 million and to grant the investors a beneficial ownership interest in the dealership. VOA/AOA relied on Shansab's representations of his financial ability and those representations were central to VOA/AOA's decision to grant the dealership to Coast. Shansab's failure to disclose that the money he promised was not his and that investors wholly unknown to VOA/AOA had an ownership interest in the dealership constituted a material breach of the express terms of the dealership application. Thus, the evidence was sufficient for the jury to find under § 56:10-9, that Coast failed to substantially comply with the franchise dealership application.

Turning to the Dealers' Act claim, we find that, taken as a whole, all of the District Court's jury instructions regarding the Dealers' Act claim, including the charge on good faith, accurately stated the law, and that there was sufficient evidence to support the jury's finding that VOA/AOA's conduct did not constitute "coercion, intimidation, or threats of coercion or intimidation." 15 U.S.C. § 1221(e). We have held that evidence that a franchisor advanced its own interests and urged compliance with franchise obligations, without more, does not constitute coercion under the Dealers' Act. *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 326 (3d Cir. 2001). However, evidence that the franchisor's reliance on franchise obligations was pretextual or in bad faith may be sufficient to show coercion. Id. at 327. Although Coast asserts that it was VOA/AOA that pressured it to sell its franchise, Coast represented in bankruptcy proceedings that its inability to maintain adequate floor plan financing

caused it to conclude that it had to sell the dealership. The fact that the bankruptcy proceedings were a "going concern" to VOA/AOA does not itself indicate that VOA/AOA's reliance on franchise obligations was pretextual or in bad faith.

Nor did the District Court abuse its discretion in precluding the admission of evidence as to the allegedly coercive and intimidating actions of VCI employees. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1341 (3d Cir. 2002) (standard of review). Coast failed to offer any evidence to show that the actions of VCI employees should be imputed to VOA/AOA.

We have thoroughly reviewed the remaining arguments on appeal and find them to be without merit.

The judgment of the district court will be affirmed. VOA/AOA's motion to expand the record is denied.

APPENDIX D – NOTICE OF APPEAL, FILED FEBRUARY 7, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FILE NO. CV97-2601 (GEB)

COAST AUTOMOTIVE GROUP, LTD.
A Delaware Corporation,

Plaintiff,

v. NOTICE OF APPEAL

VW CREDIT, INC., a Corporation,
VOLKSWAGEN OF AMERICA, a Corporation,
AUDI OF AMERICA, a Corporation,
MARGE YOST, MICHAEL RUECKERT,
STEPHEN JOHNSON

Defendants.

Notice is hereby given that Coast Automotive Group, Ltd., plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from (a) that part of that judgment of the United States District Court, District of New Jersey, entered in this action on October 30, 2002 which entered judgment in favor of defendants VOA and AOA on plaintiff's claims tried by jury and all evidentiary and *in limine* issues raised at the time of trial and (b)

that order entered on November 8, 2001 denying plaintiff's motion for a new trial on plaintiff's claims tried by jury.

RICHARD S. MAZAWEY, ESQ.

BY: _____

Richard S. Mazawey, Esq. (RM9395)
1135 Broad St., Suite 211
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(973-777-6401)
Attorney for Plaintiff,
Coast Automotive Group, Ltd.

Dated: February 7, 2003

APPENDIX E – ORDER FILED JANUARY 8, 2003

Coast Automotive Group, Ltd.,

Plaintiff,

Civ. No. 97-2601 (GEB)

v.

VW CREDIT, INC., a corporation, VOLKSWAGEN OF AMERICA, a corporation, AUDI OF AMERICA, a corporation, MARGE YOST, MICHAEL RUECKERT, and STEPHEN JOHNSON,

ORDER

Defendants.

IT APPEARING TO THE COURT that there is parallel action in this matter in the Superior Court of New Jersey, Law Division, Ocean County, entitled *VW Credit, Inc. v. Coast Automotive Group, Ltd., et al., v. VOA and AOA and John Leiphart,* OCN-L-11862-96 ("the Law Division action"); and

IT FURTHER APPEARING TO THE COURT that on October 17, 2002, after conducting a trial on the merits and considering the submissions of the parties, the Honorable Marlene L. Ford, J.S.C., issued a bench verdict ("the October 17, 2002 Verdict") and read into the record an oral decision in the Law Division action; a copy of the transcript has been provided to the Court; and

IT FURTHER APPEARING TO THE COURT that on December 16, 2002, Judge Ford entered judgment in the Law

Division action; a copy of the judgment has been provided to the Court; and

IT FURTHER APPEARING TO THE COURT that the claims asserted by Coast against VW Credit in this action are substantially identical to Coast's claims against VW Credit already litigated in the Law Division action; and

IT FURTHER APPEARING TO THE COURT that on November 4, 2002, the Court held a telephone conference call to determine whether the remaining claims pending against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson should be dismissed as moot in light of the attached Judgment entered in the Law Division; and

IT FURTHER APPEARING TO THE COURT that plaintiff Coast Automotive consents to the voluntary dismissal of all claims pending against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson in this Court and circulated a proposed form of order dismissing those claims without prejudice; and

IT FURTHER APPEARING TO THE COURT that on December 23, 2002, VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson submitted certain objections and modifications to the proposed form of order; and the Court having considered the parties submissions; and for good cause pursuant to Fed. R. Civ. P. 41 (a)(2);

IT IS this 7th day of January, 2003, hereby;

ORDERED that plaintiff's claims against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson be and hereby are DISMISSED AS MOOT; and it is further

ORDERED that the Clerk of the Court shall mark this case closed.

GARRETT E. BROWN, JR., U.S.D.J

APPENDIX F – ORDER OF JUDGMENT, FILED DECEMBER 15, 2002

RICHARD S. MAZAWEY, ESQ.
1135 Broad Street, Suite 211
Clifton, NJ 07013
(973) 777-6401

Attorney for Defendants, Tamim Shansab, et al.

VW CREDIT, INC.,
Plaintiff,
v.
COAST AUTOMOTIVE GROUP, LTD., TAMIM SHANSAB, SHANSAB REALTY, INC., SHANSAB ENTERPRISES, INC., NASIR SHANSAB
Defendants,

v.
VOLKSWAGEN OF AMERICA, AUDI OF AMERICA AND JOHN LEIPHART

Third Party Defendants,
AND

ASPEN KNOLLS AUTOMOTIVE GROUP, L.L.C.

Intervenor

Superior Court of New Jersey
Ocean County: Law Division
Civil Action
Docket No. OCN-L-1162-96

ORDER OF JUDGMENT

THIS MATTER having been brought before the Court for a non-jury trial on the claims by and between VW Credit, Inc. and John Leiphart on the one hand and Coast Automotive Group, Ltd., ("Coast"), Tamim Shansab, Shansab Realty, Inc. ("Shansab Realty"), Shansab Enterprises, Inc. and Nasir Shansab on the other hand and the Court having conducted trial and received written proposed findings of facts, propsed conclusions of law and written closing argument from the parties, for the reasons set forth on the record by the Court on Thursday, October 17, 2002 and for good cause shown:

IT IS ORDERED that on this 16th day of December, 2002 judgment shall be entered in the following manner:

1. Plaintiff VW Credit's complaint with amendments thereto for foreclosure and/or monetary judgment against Shansab Realty, Coast Automotive Group, Tamim Shansab, Nasir Shansab and Shansab's Enterprises dismissed in its entirety with prejudice;

2. Defendant Nasir Shansab's motion for a directed verdict is hereby granted with prejudice, his prior alleged personal guaranty no longer being in effect;

3. Coast Automotive Group, Ltd., is hereby granted judgment against VW Credit on its claim of breach of contract, breach of duty of good faith and fair dealing and lender liability and is granted judgment in the amount of $810,000.00 in compensatory damages and $1,000,000.00 in punitive damages. Coast's Counterclaim and Third Party Complaint against VW Credit only and John Leiphart only for negligent su-

pervison, conversion, violation of New Jersey Law Against Discrimination and tortious interference with prospective economic advantage are dismissed with prejudice;

4. Post-judgment interest shall accrue as set forth in R. 4:42-11 and shall be paid with the judgment amounts set forth in paragraph 3 above. Pre-judgment interest calculated at the rate set forth in the notes following Rule 4:42-11 January 16, 1996 to the date of entry of this judgment in the amount of _____ on compensatory only be paid with the judgment amounts set forth in paragraph 3 above [as per Schedule A]

5. A copy of this Order shall be served upon all parties within 7 days of entry thereon.

Dated: December 16, 2002

_____

Hon. Marlene L. Ford, J.S.C.

APPENDIX G – JUDGMENT, FILED OCTOBER 30, 2002

COAST AUTOMOTIVE GROUP, LTD.

Plaintiff

v.

VW CREDIT, INC., a corporation, VOLKSWAGEN OF AMERICA, a corporation, AUDI OF AMERICA, a corporation, MARGE YOST, MICHAEL RUECKERT, and STEPHEN JOHNSON,

Defendants.

Civ. No. 97-2601 (GEB)

JUDGMENT

This matter having come before the Court on a non-jury trial as to defendants' equitable fraud counterclaim and a trial by jury as to plaintiff's claims; and the issues having been tried and the jury having rendered its verdict on plaintiff's claims; and the Court having heard and considered evidence presented by the parties; and the Court having considered the pre and post-trial submissions of the parties; and for the reasons set forth in the Memorandum Opinion filed in the above-captioned matter which constitutes this Court's findings and fact and conclusions of law on the counterclaim pursuant to Fed. R. Civ. P. 52; and pursuant to Fed. R.Civ. P. 58; and for good cause shown;

IT IS this 28th day of October, 2002 hereby;

ORDERED AND ADJUDGED that judgment by special interrogatories be entered on plaintiff's claims in favor of defendants, Volkswagen of America and Audi of America and against the plaintiff, Coast Automotive;

ORDERED AND ADJUDGED that judgment entered on defendants' equitable fraud counterclaim in favor of the plaintiff and against the defendants.

GARRETT E. BROWN, JR. U.S.D.J.

APPENDIX H – JURY VERDICT SHEET, FILED SEPTEMBER 12, 2001

COAST AUTOMOTIVE GROUP, LTD., a Delaware Corporation,

Plaintiff, Civil Action No. 97-2601 (GEB)

vs. Civil Action

VW CREDIT, INC., a Corporation, VOLKSWAGEN OF AMERICA, a Corporation, AUDI OF AMERICA, a Corporation, MARGE YOST, MICHAEL RUECKERT, STEPHEN JOHNSON,

Defendants.

JURY VERDICT SHEET

PART A

Automobile Dealers' Day in Court Act

1. Do you find that Plaintiff proved by a preponderance of the evidence that Defendants failed to make a fair and equitable allocation of motor vehicles to Plaintiff?

Yes: _____X_____

No: _____

If your answer to questions 1 is yes, proceed to question 2. If your answer is no, do not answer question 2, go on to Part B.

2. Do you find that Plaintiff proved by a preponderance of the evidence that Defendants' conduct was an attempt to coerce and intimidate Plaintiff into surrendering or selling its Volkswagen and Audi franchises?

   Yes: _____

   No: _____ X _____

If your answer to question 2 is yes, proceed to question 3. If your answer is no, do not answer question 3, go on to Part B.

3. If your answers to questions 1 and 2 are both yes, do you find that Plaintiff proved that it suffered compensatory damages as a result of Defendants conduct? N/A

   Yes: _____

   No: _____

4. If your answers to questions 1 and 2 and 3 are all yes, do you find that Plaintiff proved by a preponderance of the evidence that it is entitled to punitive damages? N/A

   Yes: _____

   No: _____

PART B

The New Jersey Franchise Practices Act

5. Do you find that Plaintiff proved by a preponderance of the evidence that defendants violated the New Jersey Franchise Practices Act in their allocation of vehicles to Plaintiff as I have explained that act to you?

   Yes: _____X_____

   No: _____

6. If your answer to 5 is yes, did Defendant's prove by a preponderance of the evidence that Plaintiff failed to substantially comply with requirements of the Franchise Agreement?

   Yes: _____X_____

   No: _____

If your answer to 5 is yes and 6 is no, answer question 7. If your answer to 6 is yes, proceed to Part C and do not answer question 7.

7. Do you find that Plaintiff proved by a preponderance of the evidence that Plaintiff suffered compensatory damages as a result of Defendant's conduct? N/A

   Yes: _____

   No: _____

8. If your answer to question 7 is yes, do you find that Plaintiff has proved by a preponderance of the evidence that it is entitled to punitive damages? N/A

Yes: _____

No: _____

PART C

Damages

9. Compensatory Damages; If your answer to either or both of questions 3 and 7 is yes, what is the amount of compensatory damages which you find Plaintiff has proven by a preponderance of the evidence? N/A

$_____

10. Punitive Damages; If your answer to either or both of questions 4 and 8 is yes, what is the amount of punitive damages which you find Plaintiff has proven by a preponderance of the evidence?

$ _____

_____

FOREPERSON

APPENDIX I – ORDER FILED NOVEMBER 8, 2001

Richard S. Mazawey, Esq.
1135 Broad Street, Suite 211
Clifton, NJ 07013
(973) 777-6401
Attorney for Plaintiff, Coast Automotive Group, Ltd.
RSM9395

William B. Cummings, Esq.
112 South Pitt Street
Alexandria, VA 22314
(703)-836-7997
Attorney for Plaintiff, Coast Automotive Group, Ltd.
WC1248

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COAST AUTOMOTIVE GROUP, LTD. d/b/a/ TSE MOTOR CARS, a Delaware Corporation,

Civil Action No. 97-2601 (GEB)

Plaintiff,

v. ORDER

VW CREDIT, INC., a Corporation, VOLKSWAGEN OF AMERICA, a Corporation, AUDI OF AMERICA, a Corporation, MARGE YOST, MICHAEL RUECKERT, STEPHEN JOHNSON,

Defendants.

ORDER

THIS MATTER having been opened to the Court by the plaintiff Coast Automotive Group, Ltd. by and through their counsel the Law Offices of Richard S. Mazawey (Geoffrey J. Hill appearing) and The Law Offices of William B. Cummings, P.C. (William B. Cummings appearing) on a motion for a new trial, *inter alia,* and the defendants Volkswagen of America and Audi of America having opposed said application and the Court, having considered the submissions of the parties and the argument of counsel and for good cause shown for the reasons states on the record:

IT IS on this 7th day of November 2001

ORDERED that the motion for a new trial is hereby denied in its entirety;

ORDERED that a copy of this Order shall be served upon all counsel within 10 days of entry thereon;

APPENDIX J – TRANSCRIPT OF TELEPHONE CONFERENCE DATED APRIL 5, 1999

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

April 5, 1999

TRANSCRIPT OF TELEPHONE CONFERENCE BEFORE HONORABLE GARRETT E. BROWN, JR. UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff. Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

For the Defendant: Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

For Volkswagen Credit: James Daniels, Esq.

Audio Operator: Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

MR. REIFSTECK: Judge, the notice of termination indicates that all of the dealers are required to have a wholesale line of credit. There's a 90 – the letter is a 90-day notice that he must acquire a wholesale line of credit within 90 days, otherwise the franchises will be terminated.

THE COURT: Your position is not that if he were to lose the present case that that would act as a preclusion of any claim he may bring under this latest notice, is it?

MR. REIFSTECK: No, it has no relationship whatsoever. It's just simply an obligation under the dealer agreement to have a wholesale line of credit, and he's given notice that if he does not do it within 90 days then –

THE COURT: I'll deny a request to amend at this point. Everything has to come to a conclusion at one point.

APPENDIX K – PLAINTIFF'S PROPOSED JURY INSTURCTION NO. 12

Plaintiff's Proposed Jury Instruction No. 12

The New Jersey Franchise Practices Act also prevents franchisors from indirectly terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges that VOA and AOA so egregiously impeded its ability to perform that the attempted to "constructively terminate" its franchises. It is for you to determine whether or not VOA and AOA damage Coast in an attempt to drive it out of business.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX L – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 13

Plaintiff's Proposed Jury Instruction No. 13

The New Jersey Franchise Practices Act requires that franchisors comply with the covenant of good faith and fair dealing which is implicit in every contract. You should be aware that this duty to act in good faith is different than the duty to act in good faith under the Automobile Dealers' Day in Court Act. As a result, The New Jersey Franchise Practices Act prohibits manufacturers from imposing adverse conditions upon their francisees which amount to unreasonable standards of performance. In the event no single action of a franchisor in a particular lawsuit violates The New Jersey Franchise Practices Act, a franchisor may still violate the Act through the cumulative effect of its actions.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F. Supp. 637 (D.N.J. 1980)

APPENDIX M – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 14

Plaintiff's Proposed Jury Instruction No. 14

1. Good Faith and Fair Dealing

The law requires that each party to a contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract. This requirement of good faith and fair dealing must be maintained and exhibited in the parties' performance of their obligations throughout the tenure of the contract. This is not unlike the covenant in a marriage contract "in sickness and in health…"

The implied agreement is part of the contract, just as though the contract expressly states this good faith and fair dealing requirement.[4] To act in good faith and deal fairly, the parties must act honestly toward each other when performing or enforcing a contract.[5] The party shall not do any-

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[4] *See Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396 (1997); *Pickett v. Lloyd's*, 131 N.J. 457, 467 (1993); *Onderdonk v. Presbyterian Homes*, 85 N.J. 171, 182 (1981); *Bak-A-Lum Corp. v. Alcoa Bldg. Prods. Inc.*, 69 N.J. 123, 129-3- (1976); *Ass'n Group Life, Inc. v. Catholic Ware Veterans*, 61 N.J. 150, 152 (1972); *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 130 (1965)

[5] The U.C.C. addresses the issue. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *N.J.S.A.* 12A:1-203. Good faith is generally defined as "honesty in fact in the conduct or transaction concerned." *N.J.S.A.*. 12A:1-201(19). "Good faith in the case of a merchant means honesty in fact and the observance of reasonable commer-

thing that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[6]

The implied covenant of good faith and fair dealing may not override an expressly granted right under the contract. For example, an implied covenant of good faith and fair dealing may not override an express provision in the contract giving one party the right to terminate, and the party's motive in terminating under such circumstances may be irrelevant.[7] However, a party may not breach the duty of good faith and fair dealing in the performance of the contract.[8] A

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cial standard of fair dealing in the trade." *N.J.S.A.* 12A:2-103(b). Although the U.C.C. governed in *Sons of Thunder, Inc.*, the Court stated that the common law duty also influenced the Court's analysis. *Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 420-21.

[6] *Sons of Thunder, Inc. v. Borden, Inc. supra,* 148 N.J. at 420.

[7] *See Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 417 ("We agree . . . that the implied covenant of good faith and fair dealing cannot override an express termination clause."); *id* at 423 (" [W]here the contractual right agree with that view of the law.") *See also Prudential Stewart Realty v. Sonnenfeldt,* 285 N.J. Super. 106, 110 (App. Div. 1995) (party does not breach implied duty of good faith and fair dealing, in exercising contractual right to terminate after six months, regardless of party's motives) *certif. denied,* 143 N.J. (1996); *Karl's Sales & Service, Inc. v. Gimbel Bros., Inc.,* 249 N.J. Super. 487, 495 (App. Div.), *certif. denied,* 127 N.J. 548 (1991)

[8] *Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 419 (stating that although the duty does not trump an express termination clause, the court still "must determine whether...[party] performed its obligations in good faith."); *id* at 423-23 (stating that

party who fully complies with express contract provision may still breach the implied duty in the performance of the contract.[9] Thus, a party who is expressly entitled to terminate a contract must still give an honest effort until termination actually takes place.[10]

It is for you to determine whether or not the parties gave an honest effort in the performance of their obligations under the dealer agreement.

Adapted from New Jersey Institute for Continuing Legal Education, Model Jury Charges, Charge 4.10 "Good Faith and Fair Dealing" (2000 Edition).

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party with express termination right must still perform contract in good faith and fairly.)

[9] *Id.* at 422-23.

[10] *Id.* at 421-23.

APPENDIX N – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 12

Plaintiff's Proposed Jury Instruction No. 12

The New Jersey Franchise Practices Act also prevents franchisors from indirectly terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges that VOA and AOA so egregiously impeded its ability to perform that they attempted to "constructively terminate" its franchises. It is for you to determine whether or not VOA and AOA damaged Coast in an attempt to drive it out of business.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX O – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 13

Plaintiff's Proposed Jury Instruction No. 13

The New Jersey Franchise Practices Act requires that franchisors comply with the covenant of good faith and fair dealing which is implicit in every contract. You should be aware that this duty to act in good faith is different that the duty to act in good faith under the Automobile Dealers' Day in Court Act. As a result, The New Jersey Franchise Practices Act prohibits manufacturers from imposing adverse conditions upon their franchisees which amount to unreasonable standards of performance. In the event no single action of a franchisor in a particular lawsuit violates The New Jersey Franchise Practices Act, a franchisor may still violate the Act through the cumulative effect of its actions.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX P- LETTER TO HONORABLE GARRETT E. BROWN, U.S.D.J. FROM GEOFFREY HILL, DATED SEPTEMBER 9, 2001

Hon. Garrett E. Brown, U.S.D.J.
September 9, 2001
Page 5

because it was on finance hold VW Credit, the jury must also be entitled to consider whether or not VOA's and AOA's conduct frustrated and created adverse circumstances for Coast. How convenient for VOA and AOA not to ship Coast any vehicles for months at a time and then to argue that Coast ought to have implemented an alternative floor-plan source? If the wholesale line of credit issue is to be submitted to the jury, the jury ought to be able to consider the totality of circumstances, which includes that N.J.S.A. 56:10-7(e) requires that VOA and AOA refrain from imposing adverse and unreasonable conditions upon Coast.

Again, the issue is not "black and white" as VOA and AOA suggest.

Automobile franchisees obtain damages under N.J.S.A. 56:10-29. The provision was effective on or about November 12, 1985, some 14 years after N.J.S.A. 56:10-9 was enacted. N.J.S.A. 56:10-29 sets forth that "A motor vehicle franchisee may bring an action against the motor vehicle franchisor which has granted its franchise, or any other person, in the Superior Court to enjoin violation of this act and to recover, where appropriate, any damages sustained by the francisee as a result of a violation if this act. The franchisee, if successful, shall also be entitled to coasts of the action, including, but not limited to, reasonable attorneys fees."

VOA's and AOA's arguments that Coast is non-compliant are properly preserved as factual issues. That is to say, VOA and AOA have argued to the jury that Coast was "in violation" of its dealer agreements. The jury will consider whether or not whether or not Coast's claims for damages are as a result of the intentional acts of VOA and AOA or whether Coast's conduct is the cause of the damages it claims. The jury will adjust Coast's damage aware, if any, to reflect how much damage it feels was caused by VOA's and AOA's actions against Coast.

As a matter of federal law and federal pre-emption, VOA and AOA could not terminate Coast's franchises while it was in Chapter 11 nor could they overtly refuse to do business with Coast. The jury has the right to consider VOA's and AOA's conduct in light of their mandatory obligation to give Coast a fair and equitable allocation of vehicles. VOA and AOA were requires to sell vehicles to Coast so that Coast could re-sell them to the public.

In order to recover, Coast is required to prove that VOA's and AOA's actions were the factual cause and legal cause of its harm. VOA and AOA have the same burden in their defenses. VOA and AOA have not shown one single example, however, of an instance where N.J.S.A. 56:10-9 has been used as an absolute bar in the manner in which VOA and AOA propose to use it in this instance.

In the present posture, collateral issues of contract construction are being thrown up to the jury for consideration. Rather, it is jury's providence to determine the facts of the case.

APPENDIX Q – LETTER (CONTINUED) TO HONORABLE GARRETT E. BROWN, U.S.D.J. FROM GEOFFREY HILL, DATED SEPTEMBER 9, 2001

Hon. Garrett E. Brown, U.S.D.J.
September 9, 2001
Page 6

As Coast has suggested to this Court, most of the provisions of The New Jersey Franchise Practices Act have Noting to do with "termination, cancellation of non-renewal of franchises." It is more than 30 paragraphs and subparagraphs deal with warranty reimbursement, relocation of franchises, repurchase of parts inventories, successorship of franchises within families, jury trial waivers, choice of law and forum selection clauses. To the extent that N.J.S.A. 56:10-9 is applicable to any section of The New Jersey Franchise Practices Act, its application must be proportional and it must be consistent with Amerada Hess, which makes it clear that violations of federal and state law constitutes substantial noncompliance, not technical defects or omissions.

Coast respectfully submits that the jury cannot be instructed on N.J.S.A. 56:10:-9 as an absolute bar to Coast's claims. The law is clear regarding the type of conduct that constitutes a "substantial non-compliance."

56:10-9 does not claim that a franchisee must be in compliance with all of the franchise requirements nor in literal compliance with any of the franchise requirements.

VOA and AOA are asking this Court to put an incorrect abstraction before the jury which will prejudice Coast's right to a fair determination based upon the evidence of the record.

Coast respectfully requests that the Court instruct the jury consistent with Amerada Hess and Coast's request herein.

Respectfully submitted,

GEOFFREY J. HILL

GJH/hs:
cc w/encls.:
William D. Reifsteck, Esq.
William B. Cummings, Esq.

APPENDIX R-TRANSCRIPT OF TRIAL, DATED SEPTEMBER 5, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 5, 2001 9:18 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

The Law Office of Richard S. Mazawey
Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandra, Virginia

For the Defendant:

Capehart & Schacter
Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

For Volkswagen Credit: James Daniels, Esq.
Audio Operator: Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

The problems that happened at Coast were all the result of Coast selling cars out of trust, not having enough money, filing in bankruptcy. As you'll see, the minute they got out of bankruptcy, they started to get a lot more cars. Their problem wasn't because Volkswagen and Audi were trying to put them out of business.

"Look. As long as the Volkswagen Credit matter is going on. It's not going to change. My hands are tied." You know, "until this situation is handled, there just won't be any cars coming."

APPENDIX S -TRANSCRIPT OF TRIAL, DATED SEPTEMBER 10, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 10, 2001 8:47 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

William Cummings, Esq.
Geoffrey J. Hill, Esq.
1135 Broad Street
Clifton, NJ 07013

For the Defendant:

Capehart & Schacter
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

All right. And would you say that when you got there Coast was the kind of dealership you wanted to encourage?

Yes. They treated their customers well and they had a big facility and they were in the right market.

Did you ever ask Mr. Shansab how much money he had available to buy cars if you could deliver them to him?

No.

I understand that, Mr. Domke. Having made that decision, Mr. Domke, you had opportunities to assist it even further by suggesting other ways they could have provided more cash to you to buy more cars so you can get them more cars and get them back to the point where they were before, correct?

I guess I wasn't creative enough to think of that.

Did they think of it and tell you that they had money and could write you a check if you bring them more cars, Mr. Domke?

No.

[Domke:]

> [With respect to Coast] – the first thing I would state is that they did an excellent job in taking care of the customers. We have two customer satisfaction indexes in our business, service satisfaction and sales satisfaction and [Coast] always did an excellent job of taking care of both – their customers and as a result, they always had excellent scores in those two gauges of those performances.

1135a In 8-14 (emphasis supplied.)

APPENDIX T -TRANSCRIPT OF TRIAL, DATED SEPTEMBER 11, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 11, 2001

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

BY MR. CUMMINGS:

"In your judgment can a dealer – an Audi dealer acquire cars with their own money?

Yes, they can.

Can dealers purchase their vehicles?

Yes, they can.

Is that a proper method of purchase?

Yes, they can.

With respect to the dealer's ability to purchase or acquire cars with their own money, were there any other dealers to your knowledge in your region in the district that you operate in for Audi that acquire vehicles with their own money?

Not to my knowledge, no.

Did Coast/TSE do that?

Yes."

BY MR. CUMMINGS:

"Okay. Did Coast have a financial facility to pay for vehicles that were allocated to it?

Yes, via certified check.

And did Coast do so?

Yes.

When cars were allocated?

Yes. No. Coast -- it is not Coast – its TSE' did so prior to their vehicles being formally allocated to them.

But they paid by certified check?

They paid by certified check."

MR. CUMMINGS: Turn to page 63 starting at line 11.

APPENDIX U – TRANSCRIPT OF TRIAL, DATED SEPTEMBER 12, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 12, 2001 8:59 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

In addition, the coercion or intimidation must be actual. That is, the mere fact that a dealer feels it has been coerced or intimidated is not sufficient. It's for you to decide, on the basis of all the circumstances disclosed by the evidence, whether the defendant's conduct reached the level of actual coercion or intimidation, or threats thereof.

If you find in favor of the plaintiff, you will have to consider the issue of the plaintiff's damages. Plaintiff seeks both compensatory and punitive damages. I'll instruct you on damages later on. Damages is the third section of this charge. You'll get that in a few minutes.

Since Coast has alleged, in this lawsuit, that among other conduct, VOA and AOA intentionally and wrongfully withheld Coast's fair share allocation of motor vehicle inventory in an attempt to force Coast to surrender its Volkswagen and Audi franchises. It's for you to determine 1) whether or not VOA and AOA did, in fact, deprive Coasts of its fair share allocation of vehicles; and 2) whether or not VOA and AOA's conduct toward Coast reached a level of actual attempted coercion or intimidation.

We'll move on, now, to Coast's second claim for damages. This one is under the New Jersey Franchise Practices Act. That act governs the "termination, cancellation, or non-renewal of franchises" in the State of New Jersey. In order to terminate a franchise, that is a dealer agreement here, a franchisor, which would be the manufacturer here, must issue a letter of termination which clearly sets forth the specific grounds for termination. The franchisee, that is the dealer, may then seek relief in Court to stop the termination. In order for the franchisor to prevail in Court, the franchisee must be deemed by the Court to be substantially non-compliant with its obligations as a franchisee. Substantial

non-compliance cannot be based upon a mere technical defect or omission by the franchisee, but rather must effect the trade name of the franchisor.

In this lawsuit, it's agreed that VOA and AOA did not take steps to formally terminate Coast's Franchise pursuant to the statute. Furthermore, while Coast was under Chapter 11 protection of the Bankruptcy Code, Coast's franchises were protected, as a matter of law, by the Automatic Stay Doctrine. That doctrine, among other things, prevents parties from breaking or terminating contracts with a party that is in Chapter 11 of the bankruptcy Code.

Volkswagen and Audi agree that they could not cease to do business with Coast without seeking relief from the Bankruptcy Court. Their position is that they did not seek to terminate Coast, or cease to do business with Coast. The New Jersey Franchise Practices Act also prevents franchisors from terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges Volkswagen and Audi so egregiously impeded its ability to perform that they attempted to "constructively terminate" its franchises. Defendants deny this. It's for you to determine whether or not Volkswagen and Audi damaged Coast in attempt to drive it out of business.

A manufacturer or distributor may not be held liable or responsible under the New Jersey Franchise Practices Act if its dealer has not substantially complied with the provisions of the franchise agreement. If Audi and Volkswagen prove, by a preponderance of the evidence, that plaintiff Coast failed to substantially comply with the provisions of the franchise agreement between plaintiff and defendants, then Volkswagen and Audi cannot be held liable under law. That's the affirmative defense that I talked about before.

And as to this, Volkswagen and Audi have the burden of proof by a preponderance of the credible evidence, as I told you before.

The law is not designed to protect dealers who willfully or deliberately violate reasonable terms of their franchise agreements. Under the New Jersey Franchise Practices obligation under the agreement may recover against a manufacturer for violation of the act if they have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their rights, compensation may not be forfeited by reason of mere technical or unimportant omissions or defects. It's for you to determine whether or not the defendants have proven, by a preponderance of the evidence, that plaintiff was not in substantial compliance with the agreements.

The New Jersey act requires the parties comply with the covenant of – it should be in good faith, counsel. I see that there's a typo there. Good faith and fair dealing, which is implicit in every contract. Good faith under this law is defined differently than it is under the Dealer's Day in Court Act, the Federal act. The New Jersey act prohibits manufacturers from imposing adverse conditions upon their francisees, which amount to unreasonable standards of performance.

Plaintiff contends that defendant did not comply with Article 8, Paragraph 4 of the Standard provision. This paragraph states as follows; Dealer recognizes that certain authorized products may not be available in sufficient supply from time to time because of factors such as product importation, consumer demand, component shortages, manufacturing constraints, government regulations, or other causes. Distributor will endeavor to make a fair and equitable alloca-

tion and distribution of authorized products to it. In the event no single act of a franchisor in a particular case violates the New Jersey Franchise Practices Act, the franchisor may still violate the act through the cumulative effect of its actions." Defendants content that Volkswagen and Audi franchise agreements require all dealers to maintain specific financial accommodation for the purchase of motor vehicles, and that plaintiff did not do so. Section 3, capitalization C of the Volkswagen Dealer Operating Standards specifically provides as to wholesale lines of credit, a separate wholesale line of credit for the sale of new Volkswagen vehicles shall be maintained with the retailers, plaintiff's financial institution, and in an amount determined by Volkswagen U.S. A current written letter of commitment in a form satisfactory to Volkswagen U.S. will be provided to Volkswagen U.S. by the retailers financial institution. The retailer's financial institution will accommodate the vehicle drafting procedures employed by Volkswagen U.S. The Audi franchise agreement has a similar requirement.

The act in good faith and deal fairly, the parties must act honestly toward each other when performing or enforcing the contract. The parties shall not do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

The implied covenant of good faith and fair dealing may not override an expressly granted right under the contract. For example, an implied covenant of good faith and fair dealing may not override an express provision of the contract, giving one party the right to terminate, and the party's notice in terminating under such circumstances may be irrelevant. However, a party may not breach the duty of

good faith and fair dealing in the performance of the contract.

A party who fully complies with the express contract provisions may still breach the implied duty in the performance of the contract. Thus, a party who is expressly entitled to terminate a contract must still give an honest effort until termination actually takes place. It's for you to determine whether or not the parties gave an honest effort in the performance of their obligations under the dealer's agreement.

If you find in favor of the plaintiff, you will then have to consider the issue of plaintiff's damages. In that regard, just award the plaintiff an amount of money that would fairly and adequately compensate him for the damages as shown -- the evidence shows plaintiff has sustained, and is reasonably certain to sustain in the future as a result of the unfair deprivation of vehicles allocated to plaintiff during the period of time from December 15th, '95, until September 18th, '97. The plaintiff also seeks punitive, as well as compensatory damages, under the New Jersey statute.

I will now move on to the remaining portions of the instructions. We have Part 3, Damages, and Part 4, Duties as Jurors, and also a verdict sheet. I will discuss all of those with you right now. So, if you could just hand them out, this is the Damage section, and this is the Duties as Jurors section, and this is the verdict sheet section. And, once I've explained those, we'll take a short recess, and then you will hear from the attorneys. As I told you before, you will hear first from the defendant, and then last for the plaintiff, because the plaintiff bears the general burden of proof.

(Pause) (By VOA Counsel)

Now, the failure to have, in Volkswagen and Audi's opinion, the failure to have a wholesale line of credit was a

substantial material breach of the agreement between Volkswagen and Audi and Coast. And having, as you will go through your jury determination, when you find that Coast - - if you find that Coast failed to substantially comply with that agreement, then you are to find that there's a defense to the claims under the New Jersey Franchise Practices Act.

I think that there's no reason to have to worry about the damage aspect, because there was a material, substantial breach of the agreement by Coast in not having a floor plan, and everything flowed from that. If they had not lost their floor plan, we wouldn't be here today.

APPENDIX V – TRANSCRIPT OF HEARING, DATED SEPTEMBER 4, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 4, 2001 1:57 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
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Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

THE COURT: They can say they felt that they were in breach. As to whether there actually was breach, that's a legal issue.

I'm going to deny it without prejudice if there's an assertion made by Volkswagen or Audi which you feel would require you to reassert this position. So I will deny that without prejudice.

That resolves the in limine motions.

MR. HILL: Your Honor, I believe there was one more. I apologize. But there was one more. With regard to - - Your Honor did address the floor plan issue as alleged breach of contract. Again, I think Your Honor distinguished between raising the floor plan issue as a factual or evidentiary issue saying Volkswagen might feel something as opposed to what a legal conclusion would be about.

THE COURT: Whether they were, in fact, in breach, of course, is an issue. What they could do with it as a result, of course, would be determined by the Bankruptcy Court because the estate is in bankruptcy and even if they asserted a clear breach, they'd have to go before the Bankruptcy Court.

MR. HILL: Correct. There was a similar in limine proposed by us which had to do with the alleged "misstatement," misstatements in the application. The reason being is I think there's a grossly huge difference between asserting the alleged misrepresentations, alleged misstatements, as part of a counterclaim for fraud. Which again, we have opposed on a legal basis setting forth that you just can't sue a franchise in the State of New Jersey under the common-law to rescind a franchise because the Franchise Practices Act governs who's a franchisee and who's not. But in any event, when it comes to the alleged misrepresentations, those were

first identified, if you will, by Volkswagen in August of 1999. They then moved to add counterclaims in the state and federal cases.

THE COURT: Yes.

MR. HILL: They never moved to terminate the franchises under the agreements. In other words, they never sent out notices of termination to attempt to terminate the franchises. Again, as I referred to before, until a contract is terminate, a party must perform their obligations in good faith. I can't see as a defense - -

THE COURT: They're not asserting termination, they're asserting rescission that that contract was void ab initio.

MR. HILL: I understand they were asserting rescission with all the attendant burdens under rescission. In other words, in clear and convincing evidence and all the things that one must do under rescission. They are also though, the seem to be in their papers, asserting misrepresentations as a legal defense to our affirmative damage claims. In other words, they're using it like a -- they're saying, well, we could have terminated you, but you're not terminated. I think again, that's an issue that's like the floor plan issue. I don't know how they're –

THE COURT: That's a defense to your claim, isn't it? There's no requirement that they assert the defense before you assert the claim.

MR. HILL: Well, they're asserting it as a defense, but I don't know how legally if can be a defense because we're alleging 1996 and 1997 causes of action. They have an alleged misstatement that they're citing in 1999 which at very best they can send out a notice of termination on which might look forward. I don't know how that can be used to

attempt to be a legal excuse to relieve them from liability in 1996 and 1997. So I don't think that that can be a question that's posed to the jury as an issue to decide. Has Coast breached its contract or has it made a misrepresentation and use that a defense to our damages claim.

Again, it can be considered, again taking into all my objections as far as the rescission claim, but it can be considered as part of their rescission claim because you have your burdens of clear and convincing evidence and so forth. But what they're trying to do is they're trying to get it in the back door as a defense to our damages claims when there is nothing about this alleged misrepresentation issue which give them a legal excuse or justification for not having given cars in 1996 and 1997. I don't know how that computes.

THE COURT: All right. I think the simple answer to that is the statute creates a defenses there and it does not say you must first have terminated, but it says it is a defense. So I'm not going to take away that statutory defense --

MR. HILL: I would respectfully --

THE COURT: You have my ruling. You may disagree with it.

MR. HILL: Yeah. If I could just, respectfully for the record, note for a moment. We would most respectfully disagree with that. That there must be some relationship between an alleged breach and an alleged cause of action, both as the nature of the facts of the two. In other words, like when you have a termination then you would argue against the termination that well, this party should be terminated because they're in breach of the contract. Here we're talking about allocation. There is no justification anywhere in law not to make available a certain amount of vehicles to a fran-

chisee. They can certainly suggest that we didn't have money to buy them or something like that.

But the New Jersey Franchise Practices Act would have absolutely no effect, no teeth if every time a franchisee alleged a cause of action for failure to provide inventory or, for example, in this courthouse Judge Mary Little Cooper back in December had a case where a group of Daimler Chrysler dealers had joined together under the auspices of New Jersey Car and were challenging Daimler Chrysler's warranty reimbursement procedures. Now, based upon the proposition further by Volkswagen and Audi, what Daimler Chrysler could do could look at all those franchisees and say if you're in breach of any single provision of your franchise agreement, you can't get your money back on your warranty account. That would make absolutely not sense at all. The Franchise Practices Act would have absolutely no teeth and all it would do is anytime a franchisee filed a lawsuit on any basis, that would just cause a case within a case because anything about the franchisee would be dredged up in an attempt to make some type of legal defense rather than a factual defense.

THE COURT: Thank you. In the context of a motion in limine, my ruling stands. I'll see you at nine o'clock tomorrow. Thank you.

(Court is adjourned)

* * * * *

CERTIFICATION

I, PATRICIA A. KONTURA, court approved transcriber, certify that the forgoing is a correct transcript from

the official electronic sound recording of the proceedings in the above-entitled matter.

PATRICIA A. KONTURA
J & J COURT TRANSCRIBERS, INC.

September 23, 2003

Supreme Court, U.S.
FILED
(2)
041737 MAY 26 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP LTD.,

Petitioner,

v.

VOLKSWAGEN CREDIT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX

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SUPPLEMENTAL APPENDIX – MEMORANDUM OPINION, FILED OCTOBER 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Coast Automotive Group, Ltd. Plaintiff,	:	
v.	:	Civ. No. 97-2601 (GEB)
VW Credit Inc, a corporation Volkswagen of America, a corporation, Audi of America a corporation, Marge Yost Michael Rueckert, and Stephen and Stephen Johnson Defendants.	:	**MEMORANDUM OPINION**

BROWN, District Judge

This matter comes before the Court on a non-jury trial as to the equitable fraud counterclaim of defendants, Volkswagen of America and Audi of America's (collectively "VOA/AOA") seeking rescission of the franchise agreement with Coast Automotive Group, Ltd. ("Coast"). For the reasons discussed below, the Court enters judgment on the counterclaim in favor of the plaintiff.

I. BACKGROUND

The facts and procedural history of this case are discussed at length in the Court's prior opinions and will not be dis-

cussed here to except to the extent necessary to resolve the issues pending before the Court.

A. PROCEDURAL HISTORY

This matter has a tortured procedural history spanning multiple actions in both federal and state court. Coast has been an authorized retailer of Volkswagen and Audi cars since approximately August 1991. In or about December 1995, Coast's source of financing its inventory of cars, VW Credit, Inc. ("VCI"), withdrew its wholesale line of credit due to Coast's breach of the financing agreement and filed a verified complaint in the Superior Court of New Jersey, Law Division, against Coast, Tamim Shansab Enterprises, Inc., Shansab Realty, Inc., Tamim Shanshab, Nasir Shansab and Yama Shansab (the "Law Division Action"). Thereafter, Coast filed a bankruptcy petition seeking protection from its creditors under Chapter 11 of the Bankruptcy Code. In or about January 1997, Coast filed an adversary proceeding against VCI and VOA/AOA in the Bankruptcy Court. In May 1997, defendants moved in this Court to withdraw the reference from the Bankruptcy Court and proceed with the action here. The Court granted defendants' motion and withdrew the reference.

Plaintiff's original complaint in the federal action asserted sixteen separate counts against the defendants related to plaintiff's operation of a car dealership in Toms River, New Jersey. In August 1998, VOA/AOA moved for summary judgment on all sixteen counts in plaintiff's complaint, and plaintiff cross-moved for leave to amend the complaint to assert claims under the New Jersey Franchise Practices Act,

N.J., Stat. Ann. § 56:10-1, *et seq.*, and the federal Automobile Dealers' Day in Court Act, 15 U.S.C. §1221, *et seq.* The Court granted defendants' motion for summary judgment and also granted plaintiff's cross-motion.[1] On October 4, 1999, the Magistrate Judge granted VOA/AOA leave to assert a state law counterclaim seeking equitable rescission of the franchise agreement between VOA/AOA on the grounds that Coast's principals, Tamim and Nasir Shansab, made materially false statements to the defendants regarding the source of Coast's financing in obtaining the VOA/AOA franchise and false statements regarding Nasir Shansab's future involvement in the management of the Coast car dealership.

During the pendency of this action, in April 1998 Coast filed a third-party complaint in the Law Divisions Action against VOA/AOA, and, as the federal action, VOA/AOA counterclaimed against Coast for rescission of the franchise agreement. The Law Division entered an order preliminary enjoining VOA/AOA from terminating the franchise.

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[1] In June 1999, VCI and the individual defendants, Marge Yost, Michael Rueckert and Stephen Johnson, filed a motion for summary judgment, which the Court granted by Memorandum Opinion and Order entered on October 6, 1999. VCI and the individual defendants the sought certification of the Court's October 6, 1999 Order as a final appealable order pursuant to Fed.R.Civ. P. 54(b), which the Court granted by Memorandum Opinion and Order entered on January 27, 2000. The United States Court of Appeals affirmed in part and reversed in part the grant of summary judgment in favor of VCI and remanded the matter to this Court. However, Coast's claims against VCI are not at issue here.

In addition to the federal and Law Division actions, Aspen Knolls filed suit against Coast in the Superior Court of New Jersey, Chancery Division ("Chancery Division action") arising from an agreement in which Aspen Knolls provided Coast with a $5,000,000 loan to avoid liquidation and repay its creditors. In the Chancery Division action, the court entered a consent order incorporation an agreement in which Aspen Knolls would acquire Coast's Volkswagen, Audi, and Porsche franchises. Coast provided VOA/AOA with notice of the proposed transfer in accordance with N.J. Stat. Ann. 56:10-6 and the consent order. In response, VOA/AOA filed an order to show cause for a preliminary injunction in the Law Division action to enjoin the sale. On March 3, 2000, the Law Division granted Aspen Knolls leave to intervene and denied VOA/AOA's application for a preliminary injunction.

On May 1, 2000, Aspen Knolls applied for the transfer of the Volkswagen and Audi franchises. On June 29, 2000, VOA/AOA disapproved the applications as deficient and expressed concerns regarding the character of Aspen Knolls' majority member, Robert Mazzuoccola. Coast and Aspen Knolls filed an order to show cause in the Law Divison action seeking to enforce the consent order and compel the transfer of the franchises. After a hearing, the court ordered the parties to continue the application process, and further ordered VOA/AOA to advise Aspen Knolls regarding the application requirements. Following a second application by Aspen Knolls and disapproval by VOA/AOA, the Law Division held a plenary hearing to determine whether VOA/AOA was withholding approval in bad faith. The Law Division judge ultimately concluded that VOA/AOA had unreasona-

bly withheld approval of the transfer and ordered the transfer of the franchise to Aspen Knolls subject to the conditions of the existing franchise agreement. Despite VOA/AOA's pending claims for termination and rescission of the Coast franchise agreement, the Law Division certified the order as final pursuant to N.J.Ct,R. 4:42-2. VOA/AOA timely appealed the decision.

In September 2001, the federal action proceeded to a jury trial on Coast's claims under the Automobile Dealers' Day in Court Act claims and the New Jersey Franchise Practices Act and a bench trial on VOA/AOA's equitable rescission counterclaim. The jury found that VOA/AOA violated the New Jersey Franchise Practices Act and the Automobile Dealers' Day in Court Act in their allocation of vehicles to Coast. However, the jury also concluded by special interrogatories that Coast violated the Franchise Agreement, and that defendants' conduct was not an attempt to coerce or intimidate plaintiff into surrendering or selling the franchise. Thus, damages were not awarded to Coast. The Coast reserved decision as to the rescission claim.

In December 2001, VOA/AOA filed a motion seeking certification of the Court's prior summary judgment order in favor of VOA/AOA and the jury verdict pursuant to Fed.R. Civ. P. 54(b), and a stay of the Law Division's order compelling the transfer of the franchise. On January 4, 2002, prior to the return date on the certification motion, the Superior Court of New Jersey, Appellate Division, published an opinion affirming the Law Division order in all respects. *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 346 N.J. Super. 326 (App. Div. 2002). The opinion further provided that

"[b]ecause this issue was certified as final pursuant to R. 4:42-2, the pending claims for termination and rescission claims without prejudice.

This Court ordered additional briefing as to the effect of the Appellate Division opinion on the pending motion and the counterclaim. In light of the Appellate Division opinion, VOA/AOA withdrew its motion for certification and a stay on the record on January 18, 2002. The Court now makes the following findings of fact and conclusions of law as to the pending counterclaim pursuant to Fed.R.Civ.P. 52.

B. FINDINGS OF FACT[2]

1. Beginning in 1989, plaintiff, Tamim Shansab, worked as a salesperson for HBL, an automobile dealership located in Northern Virginia, 2T at 154.

2. While at HBL, Shansab developed a relationship with a customer, Daisuke Utagawa, in which Shansab sold cars to Utagawa that were then shipped to Japan for resale. 2T at 104, 154; 4T at 171.

3. In the course of their relationship, Utagawa and Shansab began to contemplate the acquisition of an

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[2] Reference to the transcripts of trial shall be as follows:

1T Transcript of September 5, 2001
2T Transcript of September 6, 2001
3T Transcript of September 7, 2001
4T Transcript of September 10, 2001
5T Transcript of September 11, 2001
6T Transcript of September 12, 2001

auto dealership in the United States to supply cars to Japan. 2T at 104-105, 155; 4T at 172-173.

4. In 1990, Utagawa, Reizo Utagawa, Kafuhiko Chishiki, and Hiroshi Sugimoto formed a Japanese corporation entitled U.S.C., Inc., through which the principals agreed to provide Shansab with 2.5 million dollars to purchase an automobile agency. By letter agreement dated November 23, 1990, and signed by Shansab, Utagawa, and the principals of U.C.S., Shansab confirmed that "I am proceeding in my negotiations . . . on the basis of the representations made by your principals that the total amount of Two Million Five Hundred Thousand Dollars (US $2,500,000) shall be available to me to purchase either Metropolitan Motorcars . . . or to purchase another agency not yet identified." Def. Exhibit D719.

5. In the letter agreement, Shansab provides that "[a]s per our understanding, I will execute the purchase contract, after consultation with you, in my own name. I will do so solely because of my understanding that the amount named above will be available to me to consummate the purchase for the benefit of you, your principals and myself." *Id.*

6. The letter agreement also states that "[i]t is agreed that beneficial ownership of any agency purchased pursuant to this agreement shall be forty percent held by [Utagawa], ten percent held by U.S.C., and fifty percent held by [Shansab]". *Id.*

7. In addition, the letter agreement further provides that "we have agreed that the acquired business shall pay back to UCS in U.S. dollars the total amounts of One Million, Seven Hundred Thousand Dollars (U.S. $1,700,000) . . . ." *Id.* "Of the total amount of One-Million Seven Hundred Thousand Dollars (U.S. $1,700,000), Nine Hundred Thousand (U.S. $900,000) represents a loan to the business by UCS, and Eight Hundred Thousand (U.S. $800,000) represents a loan to the business for the benefit of Tamin Shansab as further consideration of his role in securing for purchase a (*sic*) suitable agency."*Id.*

8. Pursuant to this agreement, Sugimoto borrowed $2.5 million from Chou Trust and Bank to provide Shansab with the necessary funds to purchase a dealership. 4T at 182. Thereafter, $2.25 million was wired from Japan to the attorney trust account of Shansab's attorney. *Id.* at 154-156.

9. Shansab testified that the acquisition of Metropolitan Motorcars pursuant to the November 23, 1990 letter agreement never came to fruition and that his Japanese friends decided that they were not interested in acquiring a dealership in America. 2T at 105-106. Nevertheless, Shansab testified that they allowed him to keep and use the $2.5 million to acquire a dealership on his own. Shansab and Utagawa described the money essentially as a gift with no obligation to pay back the funds. 4t at 161-162; 174-175. Based upon the various findings that follow and the simple fact that Sugimoto borrowed the funds to provide them to

Shansab and thus, was obligated to repay the loan to Chou Trust, this Court finds that Shansab and Utagawa's testimony that the funds are unencumbered is not credible.

10. In early 1991, the $2.25 million was transferred from the attorney trust account to Tamin Shansab Enterprises, Inc. ("TSE"). 2T at 155-156; 107. Shansab's 1991 Income Tax Return indicates that he operated a sole proprietorship that year under the name of Metropolitan Motor Cars. 2T at 107; Def. Ex. D692. Shansab testified that Metropolitan Motor Cars represented the wholesale purchase of automobiles and resale of those vehicles, including to Shansab's friends in Japan. 4T at 156-158.

11. Also in early 1991, Tamim and Nashir Shansab purchased the Coast dealership from the FDIC and in May of that year, submitted applications to obtain the Volkswagen and Audi franchises. 2T at 46-48; 101-103. The applications provide that Tamim Shansab would invest $1.6. million in the dealership and that Nasir Shansab would invest $400,000 in the dealership. The applications further provide that the $1.6 million an $400,000 were unencumbered and 100% owned by Tamim Shansab and Nasir Shansab respectively. Def. Exs. D8, D11. The signature page on both applications provides that "a]ny material misrepresentation, whether intentional or unintentional, in the information submitted in this application or in connection with this application shall be grounds for immediate termination of any Volkswagen Dealer

Agreement (an "Agreement") which may be granted to Applicant pursuant to this application." *Id.*

12. In addition to the applications, Tamim and Nasir Shansab each submitted a Source of Funds Statement and a Personal Statement of Applicant. In the Source of Funds Statements, Tamim and Nasir Shansab indicate that the $1.6 million and $400,000 to be invested were unencumbered personal funds derived at least in part from the TSE account holding the money from Japan. Def. Exs. D9, D87. Similarly, the Personal Statement of Applicant forms signed by Tamim and Nasir Shanab give no indication that the funds were in any way encumbered. Def. Exs. D10, D88.

13. Tamim Shansab, on behalf of TSE, signed a statement of disclosure providing that if the applicants fail to fully and accurately disclose any other agreements with third parties to World-Wide Volkswagen Corp. "then, and at the option of World-Wide Volkswagen Corp., the said approval of World-Wide Volkswagen Corp., may be withdrawn and the Volkswagen Dealer Agreement shall become null and void, *ab initio* . . . ." Def. Ex. 16.

14. After an investigation, World-Wide Volkswagen Corp. and its Audi division approved the applications in 1991 and Shansab proceeded to operate the franchise. 2T at 114-117.

15. In deposition testimony and, to a lesser extent at trial, Utagawa testified that Tamim Shansab made payments to Sugimoto in Japan by wire transfer to cover